(9)

No. 00-1011-CFX Title: Deboris Calcano-Martinez, et al., Petitioners
v.
Immigration and Naturalization Service

Docketed: December 20, 2000 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Nov 20 2000	Application (00A460) to extend the time to file a petition for a writ of certiorari from November 30, 2000 to December 30, 2000, submitted to Justice Ginsburg.
	Nov 20 2000	Application (00A462) to extend the time to file a petition for a writ of certiorari from November 30, 2000 to December 30, 2000, submitted to Justice Ginsburg.
	Nov 20 2000	Application (00A463) to extend the time to file a petition for a writ of certiorari from November 30, 2000 to December 30, 2000, submitted to Justice Ginsburg.
	Nov 20 2000	Application for extension of time to file petition and order granting same until December 30, 2000 (Ginsburg, November 21, 2000).
	Nov 21 2000	Application (00A460) granted by Justice Ginsburg extending the time to file until December 30, 2000.
	Nov 21 2000	Application (00A462) granted by Justice Ginsburg extending the time to file until December 30, 2000.
	Nov 21 2000	Application (00A463) granted by Justice Ginsburg extending the time to file until December 30, 2000.
	Dec 20 2000	Petition for writ of certiorari filed. (Response due January 19, 2001)
	Dec 20 2000	Also appendix to petition filed.
	Dec 20 2000	Motion of petitioners to expedite consideration of the petition for a writ of certiorari filed.
	Dec 22 2000	Brief of respondent Immigration and Naturalization Serivce filed.
	Dec 27 2000	DISTRIBUTED for Conference of January 12, 2001
	Dec 28 2000	Reply brief of petitioners Deboris Calcano-Martinez, et al. filed.
	Jan 8 2001	REDISTRIBUTED for Conference of January 12, 2001
	Jan 12 2001	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 26, 2001. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 28, 2001. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 16, 2001. Rule 29.2 is suspended in this case. SET FOR ARGUMENT April 24, 2001. **********
	Feb 20 2001	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
	Feb 26 2001	Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
	Feb 26 2001	Brief of petitioners Deboris Calcano-Martinez, et al. filed.
	Feb 26 2001	Brief amicus curiae of American Bar Association filed.

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Entry - Date	Proceedings and Orders
Mar 7 2001	Record filed.
Mar 9 2001	CIRCULATED.
Mar 26 2001	LODGING consisting of twenty-five copies of Transcript of Markup Session, Senate Juciary Comm., March 14, 1996,received from Solicitor General and distributed.
Mar 28 2001	Brief of respondent Immigration and Naturalization Service filed.
Apr 3 2001	Record filed.
Apr 16 2001	Reply brief of petitioners Deboris Calcano-Martinez, et al. filed.
Apr 24 2001	ARGUED.

Supreme Court
FILED

No. 00-____ 001011 DEC 20 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Immigration Appeals found that petitioners, legal permanent residents of the United States, were deportable on the basis of their prior criminal convictions and were barred from applying for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) by a recent amendment to the Immigration and Nationality Act (INA). Petitioners filed petitions for review in the court of appeals seeking review of the Board's ruling on the ground that the amendment did not apply retroactively to their cases and that, if applicable, it would violate due process and equal protection. The court of appeals consolidated the three cases and dismissed all of petitioners' claims for lack of jurisdiction in light of 8 U.S.C. 1252(a)(2)(C), one of the permanent judicial review amendments to the INA enacted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The court of appeals held, however, that petitioners could obtain review of their claims in a district court habeas corpus action under 28 U.S.C. 2241. The questions presented are:

1. Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C), it lacked jurisdiction on direct petition for review over petitioners' statutory and constitutional challenges to their final removal orders, but that the district courts had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

2. Whether IIRIRA's amendments to the Immigration and Nationality Act violate the Suspension of Habeas Corpus Clause, Article III, or the Due Process Clause of the Fifth Amendment if they preclude all review of petitioners' constitutional or statutory claims?

PARTIES TO THE PROCEEDINGS

Petitioners are Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan.

Respondent is the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI

Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The consolidated opinion of the court of appeals (Pet. App. 1a[1]) is not yet reported. The decision and order of the immigration judge (Pet. App. 34a), and the decision of the Board of Immigration Appeals (Pet. App. 37a), are unreported in *Calcano-Martinez*. The decision and order of the immigration judge (Pet. App. 40a, 43a), and the decision of the Board of Immigration Appeals (Pet. App. 48a), are unreported in *Madrid*. The decision and order of the immigration judge (Pet. App. 50a), and the decision of the Board of Immigration Appeals (Pet. App. 66a), are unreported in *Khan*.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. On November 21, 2000, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 30, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the separately bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (Pet. App. 75a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, U.S. Const., Art. I, § 9, cl. 2; the Due Process Clause of the Fifth Amendment; Article III of the United States Constitution; 8 U.S.C. 1182(c), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a)(1), (a)(2)(C), and (b)(9) (Supp. V 1999); Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546; and 28 U.S.C. 2241.

STATEMENT

Petitioners respectfully request that this petition be considered in conjunction with the Solicitor General's petition for certiorari in *INS v. St. Cyr*, No. 00-767 (filed November 13, 2000). *St. Cyr* and the instant case were companion cases in the Second Circuit, were argued before the same panel and decided on the same day (in separate opinions), and involve the same jurisdictional amendments to the Immigration and Nationality Act (INA).

As explained more fully below, petitioners do not object to the Second Circuit's holding in this case that the recent jurisdictional amendments to the INA preclude review of their constitutional and statutory claims by means of a petition for review in the court of appeals, *provided that*, as the court of appeals also held, they are entitled to pursue those claims in a district court habeas corpus action under 28 U.S.C. 2241 (the general federal habeas corpus statute). However, if the Court concludes that the jurisdictional issues raised by this case and *St. Cyr* warrant review, petitioners respectfully submit

that the instant case provides the better vehicle to address those issues because the petitioners in this case all filed petitions for review in the court of appeals *and* district court habeas actions, while the alien in *St. Cyr* filed only a habeas action. Accordingly, if the Court concludes that review is warranted, petitioners respectfully request that the Court grant certiorari in this case and hold the petition in *St. Cyr* or, alternatively, grant certiorari in both cases on the jurisdictional issues.[2]

A. Introduction

1. This case raises questions concerning the right of longtime legal permanent resident immigrants to obtain judicial review of a final order of removal in light of the permanent jurisdictional amendments to the Immigration and Nationality Act (INA). Those amendments were enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546.

Petitioners assert that IIRIRA's jurisdictional amendments do not preclude review of their challenges to their final removal orders, and that if they do preclude review of their claims, they violate the Suspension of Habeas Corpus Clause, Article III, and due process. The government contends that Congress has dictated that *no* court may hear their challenges because of the nature of the claims. The government further contends that the complete preclusion of review over petitioners' claims raises no constitutional concerns.

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[2] The government's petition in *St. Cyr* also seeks review of the Second Circuit's merits ruling in that case. Petitioners in this case raised the same or similar statutory and constitutional claims as those raised in *St. Cyr*, but the Second Circuit did not reach the merits in this case. Accordingly, this petition addresses only the jurisdictional question decided by the Second Circuit.

More specifically, the jurisdictional issue raised in this case is whether immigrants with certain criminal convictions may judicially challenge the Board of Immigration Appeals' ruling that they are statutorily ineligible to apply for a discretionary waiver of deportation. That issue raises the questions (1) whether the proper *forum* to raise this type of challenge is in the court of appeals by means of a petition for review or in the district court by means of a habeas corpus action, and (2) whether irrespective of the forum for review, the *scope* of jurisdiction is limited to reviewing only substantial constitutional claims, so that all non-constitutional errors (including errors of statutory construction, such as the statutory retroactivity claims advanced by petitioners in this case) are wholly unreviewable.

The three petitioners in this case are all lawful permanent residents of the United States who are subject to administratively final orders of removal (formerly called orders of deportation). The Board of Immigration Appeals (BIA or Board) determined that they were deportable based on their past criminal convictions and further held that a substantive amendment enacted by IIRIRA rendered them statutorily ineligible to apply for a discretionary waiver of deportation. Each petitioner sought review by filing both a district court habeas action under, *inter alia*, 28 U.S.C. 2241, and a petition for review in the Second Circuit pursuant to 8 U.S.C. 1252(a)(1), which provides a general grant of jurisdiction to the courts of appeals to review challenges to final orders of removal by means of a petition for review. Petitioners did not contest the BIA's determination that they were deportable in light of their prior criminal convictions. Rather, they challenged on statutory and constitutional grounds the BIA's determination that they were ineligible to apply for a waiver of deportation under former 8 U.S.C. 1182(c), INA § 212(c) (1994) (granting Attorney General discretionary author-

ity to waive deportation of longtime lawful permanent residents who satisfy statutory eligibility criteria). Petitioners' principal contention is a statutory retroactivity claim—that the BIA misinterpreted the temporal reach of the substantive amendments restricting or eliminating eligibility for Section 1182(c) relief and that Congress did not intend those amendments to apply retroactively to cases where, as here, the relevant criminal conduct triggering deportation occurred before passage of the amendments.

The government took the position in the court of appeals that Congress has eliminated district court habeas jurisdiction over final removal orders and placed all review of such orders exclusively in the court of appeals by petition for review. The government further contended that in light of 8 U.S.C. 1252(a)(2)(C), one of the jurisdictional provisions added to the INA by IIRIRA, the scope of review in the court of appeals was severely restricted in cases where, as here, the alien is deportable on the basis of one of the offenses enumerated in Section 1252(a)(2)(C). Section 1252(a)(2)(C) provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [various sections of the INA]." In light of IIRIRA's amendments, the government maintained that (1) jurisdiction in the court of appeals regarding eligibility for a discretionary waiver is limited to "substantial constitutional" claims and that petitioners presented no such claims, (2) non-constitutional claims regarding eligibility for a waiver cannot be heard in *any* court (district court or the court of appeals), and (3) the complete elimination of a judicial forum for petitioners' statutory retroactivity claims raises no constitutional concerns. Accordingly, the government argued that the petitions for review should be dismissed for lack of juris-

diction and that no court had jurisdiction over petitioners' claims.

Petitioners, in contrast, took the position that review over both their constitutional and statutory claims remained available and that IIRIRA would violate the Constitution if it did not permit review in *some* court over both their constitutional and statutory claims. Petitioners noted that Congress was constitutionally free to authorize review either by petition for review in the court of appeals or by habeas corpus in district court, but maintained that in light of prior Second Circuit precedent construing the structurally similar jurisdictional amendments made by IIRIRA's *transitional* rules, the proper mechanism for review of their claims was, as a matter of statutory construction, in the district court by means of a habeas corpus action.

The court of appeals noted that each petitioner was deportable on the basis of a criminal offense enumerated in 8 U.S.C. 1252(a)(2)(C) and held that Section 1252(a)(2)(C) repealed the circuit court's own petition-for-review jurisdiction over petitioners' statutory and constitutional claims regarding their eligibility to apply for a Section 1182(c) waiver of deportation. But the court of appeals held that petitioners could bring their claims in a district court habeas action under 28 U.S.C. 2241 because no provision of IIRIRA expressly repealed that grant of jurisdiction. The court of appeals further held that the scope of review in a Section 2241 habeas action included both constitutional and statutory claims. Accordingly, it dismissed the petitions for review for lack of jurisdiction without reaching the merits and held that petitioners could pursue their constitutional and statutory claims in a district court habeas action.

Because the court of appeals concluded that the district courts retain habeas jurisdiction to review petitioners'

constitutional and statutory claims, it held that the elimination of its own petition-for-review jurisdiction over petitioners' claims did not raise the "profound constitutional questions" that would have been triggered had no forum been available to raise pure questions of constitutional or statutory law regarding eligibility for a waiver of deportation. Pet. App. 31a. The court stressed that absent the alternative avenue of district court habeas review, it could not have dismissed the petitions for review without first addressing whether petitioners' constitutional or statutory claims could be completely insulated from review in any court by any means. *Id.*

As discussed more fully below, all three petitioners had previously filed district court habeas actions, but none had been adjudicated by the district court at the time of the Second Circuit's decision on the petitions for review. In two of the cases, the district court dismissed the habeas petitions without prejudice to refiling depending upon the Second Circuit's ruling on the petitions for review; to date neither has been reinstated. In the other case, the habeas petition was held in abeyance and remains pending before the district court.

2. Because the court of appeals preserved habeas jurisdiction over petitioners' constitutional and statutory claims, they do not object to the dismissal of their petitions for review. However, the government has now filed a certiorari petition in *St. Cyr* requesting that the Court review the Second Circuit's interpretation of IIRIRA's jurisdictional amendments on the ground that the Second Circuit erred in finding habeas jurisdiction (as well as the Second Circuit's merits ruling, if the Court concludes that jurisdiction exists). *INS v. St. Cyr*, No. 00-767 (filed November 13, 2000). If the Court determines that the Second Circuit's interpretation of IIRIRA's jurisdictional amendments warrants review, petitioners submit that the

instant case provides a better vehicle for doing so because petitioners filed both petitions for review and habeas corpus actions. Accordingly, if the Court determines that review is warranted, petitioners respectfully request that the Court grant this petition and hold the petition in *St. Cyr* or, alternatively, grant the petitions in both cases on the jurisdictional issues.

B. Statutory Framework

IIRIRA was enacted on September 30, 1996, and revised both the substantive and jurisdictional provisions of the INA. The jurisdictional amendments of IIRIRA that are at issue here are the *permanent* provisions codified at 8 U.S.C. 1252 *et seq*. They apply to all cases in which the administrative immigration "removal" proceedings commenced on or after April 1, 1997. *See* IIRIRA § 309(a), 110 Stat. 3009-625.

The jurisdictional issue presented by this case initially arose, however, under two prior sets of amendments to the INA enacted by Congress in 1996. The first set was enacted on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. The second was the *transitional* rules enacted by IIRIRA. *See* IIRIRA § 309(c), 110 Stat. 3009-626. Although these prior jurisdictional amendments are not directly at issue here, the decisions from the courts of appeals construing the prior amendments have had a significant impact on the manner in which the circuits have interpreted the permanent jurisdictional amendments.

1. AEDPA and IIRIRA's Transitional Amendments

Historically, deportation orders were reviewable in district court, primarily through habeas corpus, and for a brief period, through both habeas and APA declaratory

actions. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955). In 1961, Congress amended the INA and created a new judicial review scheme, formerly codified at 8 U.S.C. 1105a *et seq.* (1994), INA § 106 *et seq.*

The 1961 amendments gave the courts of appeals "sole and exclusive" jurisdiction to review final deportation orders by means of a petition for review. *See* former 8 U.S.C. 1105a(a) (1994), INA § 106(a); *Foti v. INS*, 375 U.S. 217, 221 (1963). The 1961 amendments also contained a provision that expressly stated that habeas review of deportation orders remained available, 8 U.S.C. 1105a(a)(10), INA § 106(a)(10), although there was confusion regarding precisely when aliens could invoke such jurisdiction given that the 1961 amendments simultaneously vested the courts of appeals with "sole and exclusive" jurisdiction over final deportation orders. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290, 293 (9th Cir. 1995); *United States ex rel. Marcello v. INS*, 634 F.2d. 964, 969 (5th Cir. 1981).

AEDPA was enacted on April 24, 1996, and contained two relevant changes to the judicial review scheme created in 1961.[3] First, in Subtitle A of Title IV, AEDPA § 401(e) repealed the habeas provision in 8 U.S.C. 1105a(a)(10). 110 Stat. 1268. Second, in Subtitle B, AEDPA § 440(a) amended former 8 U.S.C. 1105a(a)(10) to provide that a final order of deportation entered against immigrants deportable on the basis of certain enumerated criminal offenses "shall not be subject to review by any court." 110 Stat. 1276-1277. AEDPA's amendments did not mention 28 U.S.C. 2241.

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[3] The courts of appeals held that AEDPA's jurisdictional provisions went into effect immediately and applied to all cases pending on the date of enactment. *See, e.g., Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996).

IIRIRA became law four months later and enacted additional changes to judicial review, including both transitional and permanent jurisdictional rules. The transitional rules applied to immigration proceedings commenced before April 1, 1997, in which the deportation order became administratively final on or after October 31, 1996. IIRIRA §§ 309(a), (c)(1), (c)(4). Like AEDPA, IIRIRA's transitional amendments contained a provision that restricted review in cases involving aliens deportable on the basis of certain criminal offenses. That provision, IIRIRA § 309(c)(4)(G), provided that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." 110 Stat. 3009-626. IIRIRA's transitional rules, like AEDPA's amendments, did not mention Section 2241 habeas jurisdiction.

The jurisdictional amendments enacted by AEDPA and IIRIRA's transitional rules resulted in a 10-1 division in the courts of appeals on the question of whether aliens who are deportable on the basis of a criminal offense enumerated in AEDPA § 440(a) or IIRIRA § 309(c)(4)(G) could obtain review of the BIA's determination that they are statutorily ineligible to apply for a waiver of deportation (the question at issue here under IIRIRA's permanent rules). The circuits overwhelmingly held that such challenges could no longer be brought in the courts of appeals by petition for review, that the proper forum to challenge a denial of a waiver of deportation was in a district court habeas action, and that the scope of habeas review included, at a minimum, constitutional and statutory claims. *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483

(4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana-Pizano II*"); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). *But see LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S.Ct. 1157 (2000).

These courts concluded that the jurisdictional bar repealed their own petition-for-review jurisdiction over challenges to the denial of a waiver of deportation, including their jurisdiction to review constitutional claims, but held that nothing in AEDPA or IIRIRA's transitional rules precluded district court habeas jurisdiction over such challenges under 28 U.S.C. 2241. Applying this Court's decision in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), which declined to find a repeal "by implication" of the Court's original habeas jurisdiction under Section 2241, the circuits held that the absence of an express statement repealing Section 2241 meant that such jurisdiction remained available to review certain aspects of a deportation order that could not be challenged by a petition for review. The courts of appeals further held that the scope of habeas review was not limited to reviewing substantial constitutional claims but included review of at least certain non-constitutional *legal* claims (such as pure questions of statutory interpretation) because historically non-constitutional legal claims were reviewable in immigration habeas actions and the plain terms of Section 2241 authorized jurisdiction over violations of the "Constitution or treaties or *laws* of the United States." *See* Section 2241(c)(3) (emphasis added); *see also* Section 2241(c)(1).[4]

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[4] The lone dissenting circuit was the Seventh, but even it disagreed only in part with the majority approach. *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000). *LaGuerre*

Both the government and aliens sought review in this Court regarding the proper forum and scope of review to challenge the denial of a waiver of deportation. The government sought review in the first three decisions adverse to its jurisdictional position (the First Circuit's decision in *Goncalves*; the Second Circuit's decision in *Henderson/Navas*; and the Ninth Circuit's decision in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998)("*Magana-Pizano I*"). The Court denied the petitions in *Goncalves* and *Henderson/Navas*, and remanded the Ninth Circuit's decision in *Magana-Pizano I* for further consideration in light of the Court's intervening decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). *See Reno v. Goncalves*, 526 U.S. 1004 (1999) (denying certiorari); *Reno v. Navas*, 526 U.S. 1004 (1999) (same); *INS v. Magana-Pizano*, 526 U.S. 1001 (1999), *vacating* 152 F.3d 1213 (9th Cir. 1998).[5] *See also LaGuerre v. Reno*, 120 S. Ct. 1157 (2000) (denying alien's petition for certiorari).

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held that habeas jurisdiction was not available to challenge a final deportation order and that all review must be sought in the court of appeals by means of a petition for review. However, *LaGuerre* expressed skepticism (but ultimately did not rule) on the government's position that the *scope* of review was limited to constitutional challenges and that Congress had intended to foreclose all review of statutory claims challenging the denial of a waiver of deportation, including the statutory retroactivity claim at issue in that case: "It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." 164 F.3d at 1041.

[5] Unlike the decisions in the other circuits, the Ninth Circuit rested its decision on constitutional grounds because it found that Section 2241 had been repealed by one of IIRIRA's provisions, 8 U.S.C. 1252(g). The reach of that provision was significantly narrowed in *AADC*, 525 U.S. at 482, and on remand the Ninth Circuit joined nine other circuits in concluding that none of the applicable amendments repealed Section 2241, thereby obviating the need for a constitutional ruling. *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana-Pizano II*").

2. IIRIRA's Permanent Jurisdictional Amendments

The permanent IIRIRA amendments repealed the prior judicial review scheme (*i.e.*, the 1961 scheme as amended by AEDPA and IIRIRA's transitional rules) and substituted a new statute, codified at 8 U.S.C. 1252 *et seq.* Although the relevant permanent amendments are worded differently, the basic structure of the new provisions is the same. The permanent jurisdictional rules enacted by IIRIRA contain provisions vesting the courts of appeals with sole jurisdiction to review removal orders by petition for review (*see* 8 U.S.C. 1252(a)(1); 1252(b)(9)) and, as noted, include a provision restricting review for aliens removable on the basis of specified criminal offenses, codified at 8 U.S.C. 1252(a)(2)(C). Like the prior sets of amendments, the permanent IIRIRA amendments do not mention Section 2241 habeas jurisdiction.

As with the prior amendments, IIRIRA's permanent jurisdictional amendments have resulted in litigation regarding the availability of judicial review over challenges to the denial of a waiver of deportation. Four circuits, including the court below, have held that aliens may not challenge the denial of a waiver in the courts of appeals by means of a petition for review, but may bring both constitutional and statutory challenges to the denial of a waiver in a Section 2241 habeas action in district court. *See* Pet. App. 1a (opinion below); *Mahadeo v. Reno*, 226 F.3d 3, 13 (1st Cir. 2000), *petition for certiorari pending*, No. 00-962; *Liang v. INS*, 206 F.3d 308, 317-23 (3d Cir. 2000), *petition for certiorari pending sub nom. Rodriguez v. INS*, No. 00-753; *Flores-Miramontes v. INS*, 212 F.3d 1133, 1137 (9th Cir. 2000); *Richards-Diaz v. Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000).

Three Circuits (the Fifth, Seventh and Eleventh) have stated that there is generally no longer any habeas jurisdiction over final orders and that any review that remains for aliens removable on the basis of a criminal conviction enumerated in Section 1252(a)(2)(C) must be sought in the court of appeals by a petition for review. These courts have acknowledged that the permanent rules, like the prior amendments, nowhere mention Section 2241, but have concluded that the language and overall structure of the permanent amendments are sufficient to repeal habeas jurisdiction. *Max-George v. Reno*, 205 F.3d 194, 198 (5th Cir. 2000) (challenge to threshold finding of deportability, not denial of waiver), *petition for certiorari pending*, No. 00-6280; *Morales-Ramirez v. Reno*, 209 F.3d 977, 980 (7th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) ("*Richardson II*") (challenge to detention, not final order), *cert. denied*, 120 S.Ct. 1529 (2000).

C. Petitioners' Administrative Immigration Proceedings

1. Deboris Calcano-Martinez was admitted to the United States as a lawful permanent resident in 1971 at the age of three. Pet. App. 5a. She has four children who are United States citizens. *Id.* On April 24, 1996, petitioner pled guilty in New York state court to the offense of attempted criminal sale of a controlled substance in the third degree. She received a sentence of 1-3 years. Pet. App. 5a-6a.

Based on her criminal conviction, the Immigration and Naturalization Service (INS) instituted removal proceedings against petitioner in June 1997, charging that her criminal conviction rendered her deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony), and 1227(a)(2)(B)(i) (controlled substance offense). In July 1997, an immigration judge determined that petitioner was deportable as charged and also held that she was

statutorily ineligible to apply for a waiver of deportation under former 8 U.S.C. 1182(c), INA § 212(c), on the ground that IIRIRA had repealed Section 1182(c) as of April 1, 1997.[6]

The BIA affirmed on December 30, 1997, agreeing that petitioner was statutorily ineligible to apply for Section 1182(c) relief in light of IIRIRA. Pet. App. 37a-39a. The BIA's decision was based on IIRIRA § 304(b), 110 Stat. 3009-597, one of the permanent IIRIRA substantive amendments. Pet. App. 38a. In light of IIRIRA § 304(b), which repealed 8 U.S.C. 1182(c) (INA § 212(c)) as of April 1, 1997 (IIRIRA's general effective date), the BIA reasoned that a waiver under former Section 1182(c) was not a form of relief that is available to aliens, like petitioner, whose immigration proceedings commenced on or after April 1, 1997.

2. Sergio Madrid became a lawful permanent resident of the United States on December 20, 1989, at the age of seventeen. Pet. App. 7a. In September 1994, he was convicted in New York state court for the offense of criminal sale of a controlled substance in the second degree. He received an indeterminate sentence of four years to life

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[6] Former Section 1182(c) authorized the Attorney General (or her delegates—immigration judges and the BIA) to waive deportation for longtime lawful permanent residents who satisfied the statutory eligibility criteria. Prior to the 1996 amendments, lawful permanent residents were statutorily eligible to apply for a Section 1182(c) waiver if they had a lawful unrelinquished domicile in this country for seven years, and, if convicted of an "aggravated felony" (as defined in the INA, 8 U.S.C. 1101(a)(43) (1994)), had not served a term of imprisonment for that conviction of five years or longer. 8 U.S.C. 1182(c) (1994). *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). The request for Section 1182(c) relief was adjudicated by an immigration judge as part of the deportation process and an order of deportation was not entered until the Section 1182(c) application was adjudicated.

imprisonment, but was released after approximately four years. Pet. App. 7a.

Based on his criminal conviction, the INS instituted removal proceedings against him in June 1997. Petitioner conceded that his criminal conviction rendered him deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony) and 1227(a)(2)(B)(i) (controlled substance offense), but sought to apply for a Section 1182(c) waiver of deportation. Pet. App. 45a. In October 1997, an immigration judge determined that petitioner was statutorily ineligible for Section 1182(c) relief in light of IIRIRA, denied the request for a waiver as a matter of law, and ordered him removed from the United States. Pet. App.40a, 43a. The BIA affirmed on May 5, 1998, agreeing that petitioner was statutorily ineligible to apply for Section 1182(c) relief in light of IIRIRA's repeal of that section. Pet. App. 45a-47a.

3. Fazila Khan was admitted to the United States as a lawful permanent resident in September 1987. Pet. App. 7a-8a. She has a four-year-old daughter who is a United States citizen. Khan's mother and sister are also United States citizens, as are five of her aunts and uncles. Pet. App. 8a. In November 1996, petitioner pled guilty to a controlled substance offense committed in March 1996, for which she received a four-month sentence followed by a one-year period of supervised release. Pet. App. 8a, 59a.

Based on her criminal conviction, the INS instituted removal proceedings against petitioner in May 1997, charging that she was deportable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). She conceded that she was deportable in light of her criminal conviction, but sought to apply for a Section 1182(c) waiver. In July 1997, an immigration judge determined that she was statutorily ineligible for Section 1182(c) relief in light of IIRIRA. Pet. App. 60a. The BIA affirmed on May 28,

1997, agreeing that petitioner was statutorily ineligible to apply for Section 1182(c) relief in light of IIRIRA. Pet. App. 72a-73a.

D. Decision of the Court of Appeals

All three petitioners filed petitions for review in the court of appeals seeking review of the BIA's ruling on two main grounds. The first is a statutory claim: that IIRIRA's repeal of the INA's former Section 1182(c) waiver provision does not apply retroactively to cases where the relevant criminal conduct triggering deportation occurred before passage of the 1996 amendments. The second is a constitutional claim: that the retroactive repeal of Section 1182(c) relief under the circumstances here would be arbitrary and irrational in violation of due process and equal protection. Because of the jurisdictional controversy surrounding the 1996 amendments, all three petitioners also filed district court habeas corpus actions raising the same statutory and constitutional claims, which the district courts have declined to adjudicate pending a final disposition on the petitions for review.

The court of appeals consolidated the three petitions for review for purposes of argument and ruling and issued a consolidated decision on September 1, 2000. In light of the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C), the court of appeals held that it could not entertain petitioners' constitutional or statutory claims challenging the denial of a Section 1182(c) waiver because the jurisdictional bar in Section 1252(a)(2)(C) repealed the court's petition-for-review jurisdiction over such challenges. The court stated that it was unnecessary for it to create exceptions to the jurisdictional bar because the permanent rules left open district court habeas review under 28 U.S.C. 2241 as an adequate alternative avenue of review. By finding that habeas jurisdiction remained available to challenge the denial of Section 1182(c) relief, the court avoided the

"profound constitutional questions" that would have been triggered by a repeal of habeas corpus in the absence of some other avenue of review over petitioners' constitutional and statutory claims. Pet. App. 31a.

The court of appeals' conclusion that Section 2241 habeas review remained available was based on its prior decisions interpreting the jurisdictional provisions of AEDPA and IIRIRA's transitional rules. The court of appeals stated that under those decisions Section 2241 could only be repealed by an express directive. Noting that none of the permanent provisions mentioned Section 2241, the Court held that the amendments did not repeal that grant of jurisdiction. Pet. App. 22a-23a. The court of appeals thus held that Section 2241 jurisdiction remains available and instructed petitioners that they could pursue their claims by means of their previously-filed habeas actions.[7]

E. The *St. Cyr* Decision

St. Cyr and the instant case were argued before the same panel and decided on the same day. *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000). Like the petitioners in this case, the BIA found that the alien in *St. Cyr* was deportable on the basis of a pre-1996 criminal offense and that he was statutorily ineligible to apply for a Section 1182(c) waiver in light of IIRIRA's repeal of that form of

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[7] All three habeas petitions were filed in October 1999. In *Khan*, the habeas action was held in abeyance and remains pending. Pet. App. 8a. In the other two cases (*Calcano-Martinez* and *Madrid*), a stipulation and order was entered in December 1999 dismissing the habeas petition without prejudice to refiling depending upon the Second Circuit's disposition of the petitions for review. Pet. App. 6a-7a. The agreement provided that any refiling of the habeas petition would await issuance of the mandate by the Second Circuit, which has not yet issued because the government has moved to stay the mandate pending this Court's disposition of *St. Cyr*. The motion is currently before the court of appeals.

relief as of April 1, 1997. And, as in this case, the alien in *St. Cyr* challenged the BIA's Section 1182(c) ruling on both statutory retroactivity and constitutional due process grounds. Unlike the petitioners in this case, the alien in *St. Cyr* filed a district court habeas action but not a petition for review in the court of appeals.

The Second Circuit's *St. Cyr* decision held that the district court had habeas jurisdiction over the alien's claims and, on the merits, that the BIA erred in finding that the alien was statutorily ineligible to apply for a Section 1182(c) waiver. The court's jurisdictional discussion was brief and simply noted that the jurisdictional issue had been decided in *Calcano-Martinez. St. Cyr*, 229 F.3d at 409-10.

On the merits, the court concluded that the repeal of the INA's former Section 1182(c) waiver provision did not apply retroactively to cases where the alien's criminal conviction triggering deportation occurred by plea agreement prior to passage of the 1996 amendments, reasoning, *inter alia*, that aliens may have relied on the availability of Section 1182(c) relief when they agreed to plead guilty to an offense that would render them deportable. 229 F.3d at 417-21.

REASONS FOR GRANTING THE WRIT

The jurisdictional question decided by the court of appeals in this case was whether IIRIRA precluded *all* avenues of review over petitioners' statutory and constitutional claims, and if so, whether the *complete* preclusion of review is constitutional. The Second Circuit held that IIRIRA repeals the court of appeals' petition-for-review jurisdiction, but preserves habeas jurisdiction, and thus, does not foreclose all review. The Solicitor General's petition in *St. Cyr* urges the Court to grant certiorari to review the Second Circuit's conclusion that IIRIRA preserved

habeas jurisdiction over the types of claims raised in *St. Cyr* and this case. If the Court decides that the Second Circuit's interpretation of IIRIRA warrants review, petitioners submit that this case is a better vehicle than *St. Cyr* to undertake that review because the petitioners in this case filed petitions for review *and* district court habeas actions, whereas the alien in *St. Cyr* filed only a habeas action. Therefore, *St. Cyr* may raise issues that are ancillary to the central jurisdictional question decided by the court of appeals, *i.e.*, whether IIRIRA preserves *any* avenue of review.[8] Accordingly, if the Court decides that the jurisdictional issue warrants review, petitioners respectfully request that the Court grant this petition and hold the petition in *St. Cyr*. Alternatively, if the Court were to grant certiorari in *St. Cyr* on the jurisdictional question, petitioners respectfully request that the Court also grant this petition given the differing postures of the two cases.

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[8] The ancillary issues would arise if this Court were to hold that the statutory and constitutional claims raised in *St. Cyr* and this case are reviewable by petition for review and not by habeas corpus in the district court. Such a result would raise issues regarding whether an alien may now file a petition for review, or alternatively, may obtain habeas review even if there is *generally* no habeas jurisdiction available. These subordinate issues may turn significantly on the extent to which then-existing circuit precedent suggested that the filing of a petition for review would have been futile, thereby causing aliens to seek review only by means of a district court habeas action. *See, e.g.*, Pet. App. 29a (opinion below) (noting that Second Circuit's prior precedent construing AEDPA and IIRIRA's transitional rules foreclosed petition-for-review jurisdiction and stating that those decisions dictated the same result under the similar amendments made by IIRIRA's permanent rules); *Mahadeo*, *supra*, 226 F.3d at 8-14 (same); *Liang*, 206 F.3d at 322-23 (same).

This case presents a better jurisdictional vehicle because, as noted, the petitioners here all filed petitions for review and district court habeas actions. As the courts of appeals have recognized, the availability of habeas jurisdiction should not be assessed in isolation from the availability of petition-for-review jurisdiction. The proper interpretation and constitutionality of the recent jurisdictional amendments hinge critically on the interplay between petition-for-review and habeas corpus jurisdiction and the extent to which at least one of those avenues remains available.

Indeed, the Second Circuit in this case never suggested that petitioners could seek review in a district court habeas action irrespective of whether or not review was available in the court of appeals by means of a petition for review. The Second Circuit made clear that its conclusion that habeas review remains available could not be divorced from its holding that petitioners were precluded from obtaining review in the court of appeals by petition for review:

> Without habeas jurisdiction to review final orders, there is currently no judicial review at all of a removal order issued against a non-citizen who is ordered removable because he or she committed a certain crime. Because habeas jurisdiction is constitutionally required where the immigration laws have been interpreted to bar other forms of judicial review under § 242(a)(2)(C), our decision that habeas review remains for a criminal alien's legal challenge to his or her deportation order obviates the profound constitutional question that would arise if we concluded that all judicial review had been eradicated.

Pet. App. 31a. *See also id.* at 28a-29a (discussing prior Second Circuit precedent construing jurisdictional provisions of AEDPA and IIRIRA's transitional rules and not-

ing that because those provisions "eradicated all review [in the court of appeals] for legal residents ordered removed owing to a prior conviction, habeas review of this class of claims remains").

The Second Circuit's analysis is consistent with the analysis in other circuits. As the Third Circuit stated in finding that habeas jurisdiction remains available under IIRIRA's permanent rules to review the identical types of statutory and constitutional claims advanced in this case, "determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction." *Liang*, 206 F.3d at 312. *See also Mahadeo*, 226 F.3d at 10 ("Our conclusion that IIRIRA does not repeal the availability of § 2241 relief in immigration cases also avoids the 'serious, novel, and complex' constitutional concerns raised by the elimination of aliens' historic access to general federal habeas corpus jurisdiction when *no other* judicial review remains") (emphasis added) (citations omitted).

Thus, as the courts of appeals have recognized, if constitutionally adequate review is available by petition for review, then access to habeas review is not necessary. Similarly, if constitutionally adequate review is available in the district court, then the lack of jurisdiction in the courts of appeals by petition for review is unproblematic. However, a profound constitutional issue would arise if IIRIRA's amendments were construed to preclude both avenues of jurisdiction over either constitutional or statutory challenges. Consequently, this Court must first determine as a matter of statutory interpretation whether IIRIRA has repealed review in both the district court and the court of appeals. That question of statutory interpretation is best presented in this case because petitioners filed petitions for review and district court habeas

actions, and thus, this case does not present the ancillary questions potentially presented by cases, such as *St. Cyr*, where the alien did not file a petition for review.

Although such ancillary issues are properly of concern in cases where the alien did not file a petition for review, they are subordinate issues that go beyond the central jurisdictional question decided by the Second Circuit in this case regarding whether *any* avenue of review remains available. If this Court were to grant certiorari and were to decide that the Second Circuit erred in finding habeas jurisdiction, those ancillary issues are appropriately decided by the courts of appeals in the first instance.

The government's *St. Cyr* petition does not contend that *St. Cyr* is a better or more complete vehicle than this case to decide the jurisdictional question. The government has taken the same jurisdictional position in both this case and *St. Cyr*: that (1) IIRIRA has eliminated all habeas jurisdiction over final removal orders and placed all review in the courts of appeals by means of a petition for review, (2) the scope of review in the courts of appeals is limited to correcting substantial constitutional errors regarding eligibility for a Section 1182(c) waiver and does not encompass any non-constitutional errors, (3) the aliens in this case and *St. Cyr* have not raised a "substantial" constitutional claim, and accordingly (4) the statutory and constitutional claims raised in this case and *St. Cyr* may not be heard in any court. Moreover, the government acknowledges that the exhaustive decision issued in this case is the Second Circuit's principal jurisdictional ruling but notes in its petition in *St. Cyr* (at 19 n. 13) that it was not in a position to seek certiorari in this case because it was "nominally" the prevailing party, *i.e.*, the Second Circuit dismissed the petitions for review as the government requested.

Rather, the government seeks certiorari in *St. Cyr* because it also presents the merits question decided by the Second Circuit. The presence of the merits question in *St. Cyr* does not, of course, affect the separate question of whether that case is the best vehicle to address the *jurisdictional* issue decided by the Second Circuit. If the Court concludes that the merits issue decided in *St. Cyr* warrants review, then that question should be separately briefed and argued in that case and the jurisdictional issues should be fully addressed in this case.

In sum, given that the decision in this case was the Second Circuit's principal jurisdictional ruling, that the government's jurisdictional contentions are identical in *St. Cyr* and this case, and that the alien in *St. Cyr* did not file a petition for review, this case is the better vehicle for the Court to address the Second Circuit's interpretation of IIRIRA's jurisdictional amendments (assuming the Court concludes that the issue warrants its attention in the first place). If, however, the Court were to decide to grant review on the jurisdictional question in *St. Cyr*, petitioners respectfully request that the Court also grant this petition.

CONCLUSION

For the foregoing reasons, if the Court decides that the jurisdictional issues raised in this case and *St.Cyr* warrant review, petitioners respectfully request that the Court either (1) grant this petition and hold the petition in *St. Cyr* pending disposition of the jurisdictional issues in this case, or (2) grant the petitions in this case and *St. Cyr*.

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Supreme Court, U.S.
FILED

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No. 00-____

IN THE

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued March 30, 2000 Decided September 1, 2000)

Docket Nos. 98-4033, 98-4214, 98-4246

DEBORIS CALCANO-MARTINEZ,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SERGIO MADRID,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

FAZILA KHAN,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

OAKES, WALKER, and KEITH,*

Circuit Judges.

Lawful permanent resident aliens filed separate petitions for review of final orders of removal, seeking review of decisions of Board of Immigration Appeals that they were removable by reason of having been convicted of a certain crime and ineligible to apply for discretionary relief from deportation. Cases were consolidated. We hold that under the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act, a court of appeals lacks jurisdiction over petitions for review filed by the aliens. We further hold that the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act do not deprive federal district courts of habeas jurisdiction over purely legal claims of aliens ordered removed from the United states for having committed specific crimes.

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

LUCAS GUTTENTAG and CHRISTOPHER J. MEADE, American Civil Liberties Union Foundation, New York, NY (Lee Gelernt; Kerry William Bretz, Jules Coven, Alan Michael Strauss, Matthew L. Guadagno and Bretz & Coven, of counsel), *for Petitioners.*

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OAKES, *Senior Circuit Judge*:

The consolidated cases before the Court require us to interpret the effect of the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), on the jurisdiction of federal courts to hear challenges raised by criminal aliens with respect to removal proceedings commenced by the Immigration and Naturalization Service ("INS"). In three opinions handed down in the last three years, we considered the effect of various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the transitional rules of IRRIRA on a federal court's jurisdiction to review removal proceedings. This is our first occasion to examine the effect of IIRIRA's permanent rules in the same context.

In enacting the AEDPA and IIRIRA in 1996, Congress reworked the role of the courts in immigration decisions by severely limiting judicial review of final orders of deportation for certain classes of aliens. By enacting these laws, Congress clearly meant to speed the removal of legal permanent residents convicted of certain crimes from the United States by curtailing the availability of judicial review of their removal orders. *See* H.R. Rep. No. 104-879 at 251-61 (1997), 1997 WL 9288; H.R. Conf. Rep. No. 104-828, at 495-507 (1997), 1997 WL 563320. In our first decision interpreting Congress's 1996 amendments, we held that the AEDPA "repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain criminal offenses]." *Hincapie-Nieto v. INS*, 92 F.3d 27, 28 (2d Cir. 1996). Two years later, we held that under the transitional rules of IIRIRA, federal courts retained habeas jurisdiction under 28 U.S.C. § 2241. *See Jean-Baptiste v. Reno*, 144 F.3d 212, 220 (2d Cir.), *reh'g denied*, 175 F.3d 226 (2d Cir. 1998). Four months after our decision in *Jean-Baptiste*, we examined the scope of the remaining habeas review and held that federal courts retained jurisdiction to review statutory and constitutional challenges to deportation orders. *See Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004 (1999).

The three petitioners before us, Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan, are legal permanent residents of the United States who have been ordered deported because of prior criminal convictions. Each has filed a petition for review in this Court pursuant to INA § 242(a)(2), codified at 8 U.S.C. § 1252(a)(2), challenging the final orders of removal entered against them by the Board of Immigration Appeals ("BIA"). Each petitioner has also filed a petition for habeas corpus in a United States district court.

The petitions of Calcano-Martinez and Madrid were dismissed without prejudice to refiling after this Court's mandate in the present case, and Khan's petition is pending in the Eastern District of New York. On appeal, the petitioners do not dispute that they are aliens with criminal convictions that render them deportable under the Immigration and Naturalization Act ("INA"). Rather, they raise statutory challenges to the Attorney General's interpretation of the immigration laws under which they face deportation and constitutional challenges to the statute itself.

The INS argues that this Court does not have jurisdiction to hear these petitions. We hold, for the reasons set forth herein, that INA § 242(a)(2)(C) bars this Court from reviewing claims against final orders of removal filed by certain classes of criminal aliens, including the petitioners. We also hold that IIRIRA's permanent rules do not repeal a federal court's jurisdiction to review criminal aliens' removal orders by writ of habeas corpus under 28 U.S.C. § 2241. In doing so, we follow decisions by the Third and Ninth Circuit Courts of Appeals and the principles set forth in our prior cases interpreting the immigration laws. Accordingly, we dismiss the petitions without prejudice to the same claims being brought pursuant to habeas petitions.

I. BACKGROUND

A. Deboris Calcano-Martinez.

Deboris Calcano-Martinez is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1971, when she was three years old. She has four children who are United States citizens. On October 9, 1996, Calcano was sentenced to one to three years' imprisonment based on

her April 24, 1996, guilty plea to attempted criminal sale of heroin in the third degree, in violation of §§ 110 and 220.39 of the New York Penal Law.

On June 16, 1997, the INS commenced removal proceedings against Calcano-Martinez by filing a Notice to Appear. *See* 8 C.F.R. § 239.1(a) (1999). The notice charged that Calcano-Martinez's narcotic conviction rendered her deportable from the United States pursuant to INA §§ 237(a)(2)(A)(iii) and (a)(2)(B)(i), codified at 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i) (1999), as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law.[1]

A removal hearing, at which Calcano-Martinez was represented by counsel, was held before an Immigration Judge ("IJ"). At the end of the hearing, the IJ ordered Calcano-Martinez deportable as charged by the INS and ruled that, based on her criminal convictions, she was statutorily ineligible for any relief from removal. Calcano-Martinez timely appealed the IJ's decision to the BIA. The BIA dismissed her appeal. On January 29, 1998, Calcano filed a petition for review in this Court. On October 13, 1999, Calcano filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *See Calcano-Martinez v. Reno*, No. 99 Civ. 10481 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Calcano's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

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[1] INA § 237(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(B)(i) states that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

B. Sergio Madrid.

Sergio Madrid is a native and citizen of Mexico who remained in the United States unlawfully until his status was adjusted to lawful permanent resident of the United States at the age of seventeen. On September 6, 1994, Madrid was sentenced to a prison term of four years to life based on his conviction for the criminal sale of a controlled substance in the second degree, in violation of § 220.41 of the New York Penal Law.

On June 24, 1997, the INS commenced removal proceedings against Madrid by filing a Notice to Appear. The notice charged that Madrid's narcotic conviction rendered him deportable from the United States as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i); 8 U.S.C. § 1101(a)(43).[2] A removal hearing was held before an IJ and at the close of the hearing, the IJ rendered Madrid deportable. Madrid appealed the BIA's decision and on May 4, 1998, the BIA dismissed his appeal. On June 4, 1998, Madrid filed a petition for review in this Court. On October 13, 1999, Madrid filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *Madrid v. Reno*, No. 99 Civ. 10482 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Madrid's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

C. Fazila Khan.

Fazila Khan is a native and citizen of Guyana who was admitted to the United States as a lawful permanent

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[2] INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43), defines "aggravated felony" as a crime involving "illicit trafficking in a controlled substance."

resident on September 2, 1987. Khan's family, including her mother and sister as well as five of her aunts and uncles, are also United States citizens. She also has a four-year-old daughter who is a United States citizen. On February 13, 1997, Khan was sentenced to a prison term of four months, to be followed by a period of supervised release for one year, in connection with her November 6, 1996, guilty plea to the use of a telephone to facilitate the distribution of heroin in violation of 21 U.S.C. §§ 843(b), (d).

In May 1997, the INS commenced removal proceedings against Khan by filing a Notice to Appear. The notice charged that her offense rendered her deportable as an alien convicted of an aggravated felony. *See* INA § 237(a)(2)(A)(iii), codified at 8 U.S.C. § 1127(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(B).

A removal hearing was held before an IJ and Khan, represented by counsel, denied that she was deportable as charged. On July 24, 1997, the IJ ordered her deportable. Khan timely appealed the IJ's decision. On May 28, 1997, the BIA issued a decision dismissing Khan's appeal. On June 29, 1998, Khan filed a petition for review in this Court. On October 13, 1998, Khan also challenged her removal order by filing a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. *Khan v. Reno*, No. CV 99-6515 (E.D.N.Y. filed Oct. 13, 1999). That petition is pending.

D. INA § 212(c) Waiver from Deportation.

Under former INA § 212(c), codified at 8 U.S.C. § 1182(c) (1996), the Attorney General had discretionary authority to waive the deportation of an alien deportable because of a prior conviction where deportation would cause extraordinary hardship to the deportee or his or her

family. The permanent rules of IIRIRA, effective April 1, 1997, repealed § 212(c) in its entirety and replaced it with another form of relief entitled "cancellation of removal," found at new INA § 240A, codified at 8 U.S.C. § 1229b (1999). *See* IIRIRA §§ 304(a), (b), 110 Stat. at 3009-587-594. That relief, permitting the Attorney General to waive deportation for certain classes of aliens, is categorically not available to an alien convicted of a crime that qualifies as an "aggravated felony" under the statute. *See id.* The petitioners are each ineligible for "cancellation of removal" because their convictions qualify as "aggravated felonies" under the INA. *See* INA § 240A, codified at 8 U.S.C. § 1229b (1999); 8 U.S.C. § 1101(a)(43).

In their petitions for review to this Court, the petitioners argue that the BIA erred by interpreting IIRIRA § 304's repeal of § 212(c) relief and replacement with "cancellation of removal" to apply retroactively to an alien who is convicted before April 1, 1997, the effective date of IIRIRA § 304(a).[3] The petitioners further contend that if IIRIRA is interpreted to apply retroactively to pre-enactment convictions, § 304(a) of IIRIRA is unconstitutional because it violates their rights guaranteed under the due process and equal protection clauses of the U.S. Constitution.

II. DISCUSSION

We must consider whether we have jurisdiction over the petition before us. Implicit in this question is whether IIRIRA's permanent rules repealed habeas corpus jurisdiction to review final removal orders entered

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[3] At argument, counsel for the petitioners alternatively argued that IIRIRA §§ 304(a), (b) should not apply retrospectively to guilty pleas entered to deportable crimes prior to IIRIRA's effective date.

against a legal resident alien who is removable because of a prior conviction. *See Liang v. INS*, 206 F.3d 308, 312-13 (3d Cir. 2000) (noting the interrelationship between jurisdiction over a petition for review and habeas corpus). The permanent rules of IIRIRA are Congress's most recent enactment, in a line of many, on the subject of the judicial review available over immigration decisions. A complete discussion of the history of judicial review of immigration orders is set forth in this Court's decision in *Henderson*, 157 F.3d at 112-17. For our purposes on this appeal, it is necessary to begin with the 1996 amendments to the INA.

A. The AEDPA.

In April of 1996, Congress enacted the AEDPA, which included two provisions relevant to the judicial review of immigration decisions. Prior to the enactment of the AEDPA, INA § 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10) (1996). Section 401(e) of the AEDPA, entitled "Elimination of Custody Review by Habeas Corpus," explicitly repealed prior INA § 106(a)(10). *See* AEDPA § 401(e), 110 Stat. at 1268. Section 440(a) was enacted to replace the repealed provision and substitute the following language:

> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

AEDPA § 440(a), 110 Stat. at 1276-77, codified at 8 U.S.C. § 1105a(a)(10) (1996) (repealed by IIRIRA § 306(b), 110 Stat. at 3009-612, September 30, 1996, with respect to deportation proceedings commenced after April 1, 1997).

In *Hincapie-Nieto*, 92 F.3d at 29-30, we held that § 440(a) repealed a court of appeals's pre-existing jurisdiction over petitions for review filed by aliens ordered deported because of the convictions specified. In holding that our jurisdiction over a petition for review was repealed, we noted that "[t]he absence of an opportunity for some aliens to file a petition for review in a court of appeals does not necessarily mean . . . that the federal courts are closed to all claims by such aliens arising in the course of deportation proceedings." *Id.* at 30. In *Hincapie-Nieto*, it was not necessary to determine whether district courts continued to have 28 U.S.C. § 2241 habeas jurisdiction over final deportation orders after the AEDPA. In dicta, however, we stated that no constitutional infirmity appeared to arise from AEDPA § 440(a)'s repeal of our jurisdiction because the INS assured that at least some avenue for judicial relief remained available through a challenge to detention by application for habeas corpus. *See id.* at 30-31.

Our suggestion in *Hincapie-Nieto* that AEDPA § 440(a)'s bar of judicial review under the INA was constitutional because courts might review deportation orders through habeas corpus petitions was in accord with the vast majority of courts of appeals to consider the same issue. *See Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Mendez-Morales v. INS*, 119 F.3d 738, 739 (8th Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-4 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 (10th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668-70 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790-

91 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

B. IIRIRA's Transitional Rules.

Five months after enacting the AEDPA, on September 30, 1996, Congress enacted IIRIRA, which further narrowed judicial review for legal residents ordered removable because they were convicted of certain crimes. IIRIRA contains two sets of provisions. The transitional rules (which are not codified in the U.S. Code) control deportation proceedings commenced prior to April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. Section 309(c)(4)(G) of IIRIRA's transitional rules is the successor to AEDPA § 440(a) and provides in more absolute language that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [the deportation proceedings of the INA]." IIRIRA § 309(c)(4)(G), 110 Stat. at 3009-626, codified at 8 U.S.C. § 1101 note (1999).

In addition, IIRIRA § 306(a) amends INA § 242(g) to provide:

> Exclusive Jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

IIRIRA § 306(a), 110 Stat. at 3009-612, codified at 8 U.S.C. § 1252(g) (1999). Although INA § 242(g) is listed with the permanent provisions, IIRIRA § 306(c)

makes § 242(g) applicable to both transitional and permanent rules cases. *See* IIRIRA § 306(c), 110 Stat. at 3009-612.

In *Jean-Baptiste*, 144 F.3d at 214-18, this Court considered whether INA § 242(g) divested federal courts of jurisdiction over a case where legal residents, ordered deported because of a criminal conviction, maintained that their right to due process was violated because they had never been given notice that their criminal conviction could subject them to consequences under the immigration laws. Finding that plaintiffs' claims arose out of "the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," this Court held that INA § 242(g) deprived federal courts of jurisdiction to hear plaintiffs' claims. *See id.* at 218.

We reasoned, however, that all review had not been eliminated by INA § 242(g) or the AEDPA. *See id.* Relying on the doctrine articulated in *Felker v. Turpin*, 518 U.S. 651, 659-61 (1996), that repeal by implication of the right to petition for habeas corpus relief is disfavored, we held that:

> Nothing in the language of either the [AEDPA] or [IIRIRA] suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus. Those two Acts therefore do not specifically exclude habeas review in deportation cases under § 2241 . . . .

Id. at 219. Therefore, in *Jean-Baptiste*, this Court concluded that the AEDPA and IIRIRA's transitional rules did not repeal the habeas jurisdiction granted to federal courts by Congress in 28 U.S.C. § 2241 to review challenges to final deportation orders. We left open the question of the scope of the habeas review of immigration

decisions available under 28 U.S.C. § 2241. *See id.* at 220.

Our decision in *Jean-Baptiste* is in accord with the majority of circuits also to hold that the language of § 242(g) did not repeal habeas jurisdiction over immigration decisions. The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals held that habeas jurisdiction to review final deportation decisions survived the AEDPA and IIRIRA transitional rules' streamline of the judicial review available under the INA. *See Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999); *Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999); *Requena-Rodriquez v. Pasquarell*, 190 F.3d 299, 306 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1145-46 (10th Cir. 1999), *cert. denied*, *Palaganas-Suarez v. Greene*, ___ U.S. ___, 120 S. Ct. 1539 (2000); *Shah v. Reno*, 184 F.3d 719, 723-24 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 236-37 (3d Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 119-23 (1st Cir. 1998), *cert. denied*, *Reno v. Goncalves*, 526 U.S. 1004 (1999). Only the Seventh Circuit has held that the transitional rules of IIRIRA effected a repeal of habeas jurisdiction over final deportation orders. *See LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied*, *Reno v. LaGuerre*, ___ U.S. ___, 120 S. Ct. 1157 (2000).

In *Henderson*, 157 F.3d at 118-22, we reaffirmed our synthesized holding of *Hincapie-Nieto* and *Jean-Baptiste* that under the INA, modified by the AEDPA and IIRIRA's transitional rules, an alien ordered deported because of a criminal conviction cannot seek a petition for review in the court of appeals but must pursue a claim in a habeas proceeding pursuant to 28 U.S.C. § 2241. Although the panel questioned the wisdom of

having the channel for review be by habeas in the district court rather than by petition for review in the courts of appeals, it acknowledged that it was bound by a reasonable comprehension of the statute and Second Circuit precedent. *See id.* at 119 n.9; *see also Jean-Baptiste*, 175 F.3d at 226 (denying a subsequent petition for rehearing despite the *Henderson* panel's questioning).

We also considered in *Henderson* the breadth of review available under habeas corpus, the question left open after *Jean-Baptiste*. The INS argued that review only of "substantial" constitutional claims remained and that the courts were without power to review the Attorney General's interpretation of the immigration laws. *See Henderson*, 157 F.3d at 119-20. We soundly rejected the INS's argument and held that federal courts have jurisdiction under 28 U.S.C. § 2241 to consider all claims that are purely legal in nature—including constitutional challenges and claims that the Attorney General misinterpreted the immigration laws. *See id.* at 122.

C. IIRIRA's Permanent Rules.

The permanent rules of IIRIRA govern deportation proceedings initiated after April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. The parties agree that because deportation proceedings were not initiated against any of the petitioners until after April 1, 1997, the permanent rules apply to their cases. The permanent rules revamp the INA by striking 8 U.S.C. § 1105(a) in its entirety and relocating the rules governing judicial review of deportation orders to 8 U.S.C. § 1252. *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612.

The INS argues that the court of appeals is the exclusive forum for all immigration matters, invoking several provisions of the permanent rules in support of its position that IIRIRA, in its final form, divests district courts

of their habeas jurisdiction. The INS calls our attention to newly added INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), 242(g) and 242(b)(9). *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612. Section 242(a)(1) of the INA provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28 [the Hobbs Act] . . . .

8 U.S.C. § 1252(a)(1) (1999). The INS argues that because the Hobbs Act gives exclusive jurisdiction to the court of appeals, *see* 28 U.S.C. § 2342 ("The court of appeals . . . has exclusive jurisdiction" over specified agency orders), § 242(a)(1) evidences Congress's intent to eradicate habeas review.

Section 242(a)(2)(C) of the INA is the successor to AEDPA § 440(a) and IIRIRA § 309(c)(4)(g) and in its final form now states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [the deportation sections of the INA].

8 U.S.C. § 1252(a)(2)(C) (1999). The INS argues that when it added the "notwithstanding any other provision of law" phrase to the final incarnation of this section, Congress explicitly repealed habeas jurisdiction.

The INS also relies on INA § 242(e)(2). This section provides:

> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
>
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157, or has been granted asylum under section 1158, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 12255(b)(1)(C) of this title.

8 U.S.C. § 1252(e)(2) (1999). The INS contends that because INA § 242(e)(2) provides for statutory habeas review under the delineated circumstances, Congress knew how to create habeas review under the INA when it so desires. It follows, according to the INS, that Congress's decision to omit analogous language in regard to an alien's challenge to his or her final deportation order demonstrates its intent that this review be unavailable.

The INS additionally points to INA § 242(g), a section already considered by this Court in *Henderson*. Section 242(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

8 U.S.C. § 1252(g) (1999).

Finally, § 242(b)(9), upon which the INS rests its principal argument provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (1999). The INS argues that because INA § 242(b)(2) requires that all petitions for review "be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," § 242(b)(9) necessarily divests any court of jurisdiction other than the appropriate court of appeals. In support of this argument, the INS points to the Supreme Court's recent characterization in dicta of § 242(b)(9) as a "zipper clause" that channels all review of removal decisions under the INA into the court of appeals. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("AADC").

Four courts of appeals have considered arguments similar to those presented by the INS in this case. The Fifth and Eleventh Circuit Courts of Appeals adopted the INS's position; the Third and Ninth rejected it.

In *Richardson v. Reno*, 180 F.3d 1311, 1312-13 (11th Cir. 1999) ("*Richardson II*"), *cert. denied*, *Richardson v. Reno*, ___, U.S. ___, 120 St. Ct. 1529 (2000), the Eleventh Circuit reaffirmed its holding in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) ("*Richardson I*"), after reconsideration in light of the Supreme Court's decision in *AADC*, that IIRIRA's permanent rules eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings. The court held that INA § 242(b)(2), § 242(e)(2) and the AEDPA's elim-

ination of habeas review in § 401(e) evidenced Congress's intent to preclude statutory habeas review over immigration decisions. *See id.* at 1314. More specifically, the court held that INA § 242(b)(9) and the Supreme Court's description of that section in *AADC* as a "zipper clause" that channels judicial review of immigration decisions exclusively into that provided by the INA, was evidence that Congress intended to repeal all habeas review. *See id.* at 1314-15. The court concluded that the repeal of habeas jurisdiction to review immigration decisions is not unconstitutional because judicial review still remains under INA § 242(a)(2)(C) to determine whether the petitioner is an alien, is deportable, and deportable for a reason covered by INA § 242(a)(2)(C). *See id.* at 1315-16. Furthermore, the court said, review of substantial constitutional questions and challenges to the constitutionality of the INA itself remains available because INA § 242(a)(2)(C) does not literally foreclose constitutional challenges to the statute itself. *See id.* at 1316 n.5.

In *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000), the Fifth Circuit followed the lead of the Eleventh Circuit and agreed with the INS that 28 U.S.C. § 2241 habeas jurisdiction had been repealed by IIRIRA's permanent rules. According to the Fifth Circuit, Congress need not explicitly mention habeas jurisdiction generally or § 2241 by name to repeal habeas jurisdiction. *See id.* at 199 ("While Congress could theoretically have been more explicit by specifically mentioning habeas corpus in general or § 2241 in particular, we believe the jurisdictional limitation described throughout § 1252 was sufficiently explicit."). Accordingly, the court reasoned that, unlike the language in IIRIRA's transitional rules, the jurisdiction-stripping provisions in the permanent rules, beginning with the far more preclusive language "notwithstanding any other provisions of law," explicitly

repealed § 2241 habeas jurisdiction over immigration decisions. *Id.* at 198. The Fifth Circuit, like the Eleventh Circuit, reasoned that the repeal was not unconstitutional because sufficient judicial review remained available for criminal aliens' challenges against removal under INA § 242(a)(2)(C). *See id.* at 199-201. It did not go as far, however, as the Eleventh Circuit to hold that review of constitutional and statutory claims were preserved. It held instead that the court of appeals retains jurisdiction under § 242(a)(2)(C) only to determine whether the prerequisites for precluding review are met, whether the provisions classifying the petitioner in a specific criminal category are constitutionally applied, and whether the level of judicial review remaining in a particular case satisfies the Constitution. *See id.*

In *Liang v. INS*, 206 F.3d 308, 316-18 (3d Cir. 2000), the Third Circuit parted ways with the Fifth and Eleventh Circuits, holding that because none of the sections in § 1252 expressly refers to habeas jurisdiction or to § 2241, none expressly revoked habeas jurisdiction. The court reasoned that the Supreme Court did not, in *AADC*, decide that § 242(b)(9) radically eliminated habeas jurisdiction because that was not the issue raised in that case, and the Supreme Court explicitly noted that courts were in disagreement whether habeas jurisdiction remained after IIRIRA. *See id.* at 319. The Third Circuit also disagreed with the Fifth and Eleventh Circuits' conclusion that sufficient judicial review remained under § 242(a)(2)(C) so that the repeal of habeas was not unconstitutional, and continued to adhere to its earlier ruling in *Sandoval*, 166 F.3d 225, that the language of § 242(a)(2)(C) makes clear that the court of appeals lacks jurisdiction over petitions of review filed by aliens removable because of prior convictions. *See id.* at 321. Because no judicial review of criminal aliens' statutory and constitutional claims remains under § 242(a)(2)(C),

the court concluded that a repeal of habeas jurisdiction over immigration decisions raises serious constitutional questions. *See id.* at 321-22.

The Ninth Circuit, following the lead of the Third Circuit, held that IIRIRA's permanent rules do not use language explicit enough to repeal a federal court's habeas jurisdiction to review final removal orders. *See Flores-Miramontes v. INS*, 212 F.3d 1133, 1137-38 (9th Cir. 2000). The court reasoned that although the language of the permanent rules is stronger than that of the transitional provisions, the difference would not cause it to depart from its decision in *Magana-Pizano*, 200 F.3d 603, to find a repeal of 28 U.S.C. § 2241 jurisdiction over final removal orders. *See Flores-Miramontes*, 212 F.3d at 1137. Furthermore, the court held that § 242(b)(9) and the Supreme Court's remarks about that provision did not require the conclusion that habeas review is repealed. *See id.* at 1139. Finally, the court found that an interpretation that IIRIRA does not repeal habeas jurisdiction avoids a substantial constitutional question. *See id.* at 1141-42. In so doing, it rejected the INS's argument that review of substantial constitutional claims remained in the court of appeals under a petition for review. *See id.* at 1142.

We are persuaded by the Third and Ninth Circuits' reasoning in *Liang v. INS* and *Flores-Miramontes v. INS* that Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders. We conclude that the scope of this review includes statutory claims such as those raised by the petitioners in this case. We do not read any exceptions into INA § 242(a)(2)(C) that bars our jurisdiction over petitions to review removal orders against aliens convicted of certain crimes. It is also our view that our preservation of habeas jurisdiction under the permanent rules avoids the novel and profound constitutional ques-

tions that would arise were we to find that IIRIRA eliminates habeas jurisdiction over final immigration decisions.

We will not strain to infer that Congress radically repealed the federal courts' habeas jurisdiction to review final orders of removal. In *Felker*, 518 U.S. at 657, the Supreme Court considered whether Title I of the AEDPA, a statute limiting the right to file successive habeas petitions that specifically provided that a court of appeals's decision denying leave to file a successive petition could not be appealed or be the subject of a petition for rehearing or petition for *certiorari*, *see* 28 U.S.C. § 2244(b)(3)(E), deprived it of jurisdiction to entertain an original application for habeas relief. The Court concluded that because no provision of Title I explicitly mentioned its authority to entertain original habeas petitions, it would not find a repeal of habeas jurisdiction by implication. *See id.* at 660-61. In so holding, the Court restated its rule developed more than a century earlier in *Ex Parte Yerger*, 75 U.S. 85 (1868), that repeals of jurisdictional statutes by implication are not favored. *See Felker*, 518 U.S. at 660. This rule requires that a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name.

In *Jean-Baptiste*, 144 F.3d at 220, we determined that although the AEDPA and IIRIRA's transitional rules eliminated habeas corpus review under INA § 106(a)(10), neither specifically discussed 28 U.S.C. § 2241 or habeas jurisdiction generally. Following the rule articulated in *Felker*, we held that Congress did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *See id.* In order to find habeas jurisdiction eradicated, our precedent thus requires an explicit statement from Congress that mentions a repeal of habeas juris-

diction. The majority of other circuit courts have also held that Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it. *See Flores-Miramontes*, 212 F.3d at 1137; *Liang*, 206 F.3d at 320; *Magana-Pizano*, 200 F.3d at 608-9; *Pak*, 196 F.3d at 673; *Bowrin*, 194 F.3d at 489; *Jurado-Gutierrez*, 190 F.3d at 1145-46; *Shah*, 184 F.3d at 724; *Goncalves*, 144 F.3d at 119; *but see LaGuerre*, 164 F.3d at 1038-39.

Nothing in IIRIRA's permanent provisions requires us to stray from our determination in *Jean-Baptiste* that habeas review survives IIRIRA. Although the language is arguably more restrictive, there is still nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241. Although each new provision works to narrow or limit the judicial review available to the criminal aliens under the INA, INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), and 242(g)[4] do not explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241. *See* 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), (e)(2), and (g) (1999). Judicial review and habeas corpus have distinct technical meanings under the law. *See Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953); *see also Flores-Miramontes*, 212 F.3d at 1140 (citing *Sandoval*, 166 F.3d at 235). We will not infer that Congress meant to repeal habeas corpus review under 28 U.S.C. § 2241 when it mentioned only judicial review, a distinct and separate concept from habeas.

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[4] Indeed, the INS's argument that INS § 242(g) repeals § 2241 habeas jurisdiction over final deportation orders is foreclosed by the Supreme Court's decision in *AADC*, interpreting § 242(g) to apply only to the three discrete immigration decisions identified in the section. *See* 525 U.S. at 482.

Felker's requirement that Congress provide an explicit statement in order to repeal habeas jurisdiction is particularly relevant in this case. As the Ninth Circuit pointed out, *Felker* was decided three months before IIRIRA became law. We assume that Congress is aware of the law, *see U.S. v. Georgopoulos*, 149 F.3d 169, 172 (2d Cir. 1998) (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)), and therefore aware of *Felker*'s mandate when it considered the transitional and permanent rules of IIRIRA. *See Flores-Miramontes*, 212 F.3d at 1139. Had Congress intended that the avenue of review available under 28 U.S.C. § 2241 be repealed, it knew to use more explicit language than it chose.

The INS rests heavily on the phrase "notwithstanding any other provision of law" added to INA § 242(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C) (1999). However, we were not persuaded that the same exact phraseology repealed § 2241 habeas jurisdiction when, in *Jean-Baptiste*, we examined the effect on habeas jurisdiction of INA section 242(g). *See* 144 F.3d at 218. Other courts of appeals have also held that the "notwithstanding" language was not strong enough to repeal habeas jurisdiction. *See Sandoval*, 166 F.3d at 236; *Goncalves*, 144 F.3d at 122. Our holding and our application of it in *Jean-Baptiste* controls our interpretation of the permanent rules and requires a conclusion that the permanent rules do not divest federal courts of jurisdiction to review a criminal alien's legal challenge to his or her removal order.

As for the INS's reliance on § 242(b)(9), we first recognize that § 242(b)(9) does not expressly mention habeas jurisdiction or § 2241. INA § 242(b)(9) is a congressional limitation on judicial review and does not concern habeas jurisdiction. Thus, under *Felker* and our decision in *Jean-Baptiste*, § 242(b)(9) does not constitute a repeal of habeas corpus.

Furthermore, we are not persuaded by the INS that the Supreme Court's characterization of INA § 242(b)(9) as a "zipper clause" requires us to hold that it effects a repeal of habeas jurisdiction. In *AADC*, a group of temporary residents, who belonged to the Popular Front for the Liberation of Palestine, sought injunctive and declaratory relief on the ground that the INS was selectively enforcing the immigration laws against them in violation of their First and Fifth Amendment rights. *See* 525 U.S. at 473-74. The INS sought to dismiss the case for lack of jurisdiction, arguing that INA § 242(g), made applicable to the case by § 306(c)(1) of IIRIRA, deprived the courts of power to hear the appeal. *See id.* at 475. The Supreme Court agreed with the INS that INA § 242(g) deprived federal courts of jurisdiction over the petitioners' selective enforcement case until the deportation orders against them became final, if ever. *See id.* at 482. The Court, however, rejected the "unexamined assumption that § 1252(g) covers the universe of deportation claims" and held that the section covered only the three discrete actions delineated by the statute: the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders. *See id.*[5] In *AADC*, the Supreme Court contrasted the narrow scope of INA § 242(g) with INA § 242(b)(9), which it described as an "unmistakable zipper clause" that channels judicial review of all immigration-related decisions and actions to the court of appeals. *Id.* at 482-83.

The Court's description of INA § 242(b)(9) as a "zipper clause" that "channels judicial review" of immigra-

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[5] The Supreme Court thus held that INA § 242(g) applies in a very narrow class of cases. This holding is contrary to our interpretation of that section in *Jean-Baptiste* where we assumed that it governed in the case before us. This distinction has no bearing, however, on our holding in *Jean-Baptiste* that the language of § 242(g) was insufficient to repeal § 2241.

tion decisions to the court of appeals was not a holding that § 242(b)(9) divests federal courts of § 2241 habeas jurisdiction. The discussion of § 242(b)(9) in *AADC* pertained to whether § 242(g) was redundant of § 242(b)(9). By interpreting § 242(g) narrowly, the Supreme Court held that the apparent redundancy was a "mirage." *Id.* at 482. Far from deciding the question what habeas relief remained after IIRIRA, the Court chose not to address the question. *See id.* at 480 n.7 (noting disagreement among the courts of appeals). To repeat, that case did not concern a habeas petition but was a case brought under a federal court's federal question subject matter jurisdiction. *See id.* at 474. Therefore, "that case does not require a conclusion contrary to the rule set forth in *Felker*." *Flores-Miramontes*, 212 F.3d at 1139. Accordingly, we will not presume that the Supreme Court meant its decision in *AADC* to have the radical effect of repealing habeas jurisdiction when it declined to address the issue directly.

As the Ninth Circuit points out, our interpretation that INA § 242(b)(9) does not eradicate 28 U.S.C. § 2241 habeas jurisdiction does not render that section meaningless. *See Flores-Miramontes*, 212 F.3d at 1140. Put differently, § 242(b)(9) forces a legal resident alien in removal proceedings to save all of his or her challenges to an unlawful government decision or action until after a final removal order is issued. Congress enacted INA § 242(b)(9) for the important purpose of consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals. *See id.* at 1141. Before INA § 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate

court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition. *See* 8 U.S.C. § 1252(b)(9); *Flores-Miramontes*, 212 F.3d at 1140-41. Hence, § 242(b)(9) concerns judicial review in a civil action brought under 28 U.S.C. § 1331 rather than review under habeas corpus. Finally, our interpretation of IIRIRA's permanent rules as preserving 28 U.S.C. § 2241 habeas jurisdiction allows us to avoid the serious constitutional question that a repeal of habeas jurisdiction over removal proceedings involving criminal aliens would raise under the Constitution. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting a federal statute to avoid a serious constitutional question presented where the statute appeared to foreclose review of constitutional claims); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis *J.*, concurring) (same). The Suspension Clause mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require." U.S. Const. art. 1, § 9, cl. 2. Just recently, Justice Stevens, writing for the Supreme Court majority, remarked that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, ___ U.S. ___, 120 S. Ct. 1595, 1603 (2000). Historically, legal permanent residents ordered removable from this country have been entitled to assert their legal rights in habeas corpus proceedings. *See e.g.*, *Heikkila*, 345 U.S. at 230; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *United States v. Jung Ah Lung*, 124 U.S. 621, 622-23 (1888). Indeed, non-citizens have long been permitted to raise statutory claims, similar to those raised by the petitioners before us, that are based on the executive branch's misinterpretation of the immigration laws. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-600 (1953); *Wong Yang Sung v.*

McGrath, 339 U.S. 33, 48-53 (1950); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948); *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947); *Kessler v. Strecker*, 307 U.S. 22, 28-32 (1939); *Mahler v. Eby*, 264 U.S. 32, 45 (1924). An interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes would therefore raise a serious constitutional question under the Suspension Clause of the Constitution.

The INS argues that a constitutional question does not arise if 28 U.S.C. § 2241 jurisdiction is repealed because the constitutionally-mandated amount of judicial review remains under the INA. Specifically, although it acknowledges the broad preclusive language of § 242(a)(2)(C) and the majority of courts' interpretation of it, *see supra* at II. A, the INS assures us that a criminal alien may still obtain review of his or her removal orders pursuant to a petition for review in a court of appeals. It argues that this review includes all that is required by the Constitution—"substantial" constitutional claims and "certain jurisdictional facts" including whether the petitioner is an alien who is removable by reason of having committed a specified criminal offense.

It is true that the Supreme Court has held that Congress may divest the district courts of habeas jurisdiction without violating the Constitution so long as it substitutes "a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). In accord with this principle, we heretofore have recognized the need for adequate judicial review of the legal challenges filed by a criminal alien. We have determined that, because § 242(a)(2)(C) eradicated all review for legal residents ordered removed owing to a prior conviction, habeas review of this class of claims

remains. *See Henderson*, 157 F.3d at 119; *Jean Baptiste*, 144 F.3d at 219; *Hincapie-Nieto*, 92 F.3d at 31.

The INS's interpretation of INA § 242(a)(2)(C) and its definition of what review is required by the Constitution is a misapprehension of the law, in conflict with our prior decisions, and difficult to reconcile with the INS's earlier position taken in *Hincapie-Nieto*. Although a federal court of appeals generally retains jurisdiction under INS § 242(a)(1) to review a legal resident alien's challenge to his or her final order of removal, INA § 242(a)(2)(C) excepts this review for a petition filed by a detained alien ordered removable because of a criminal conviction. *See* 8 U.S.C. § 1252(a)(2)(C). Thus, in *Hincapie-Nieto* and *Jean-Baptiste*, we interpreted § 242(a)(2)(C) as barring all review of a final order of removal entered against an alien removable because of a prior conviction. *Hincapie-Nieto*, 92 F.3d at 30; *Jean-Baptiste*, 144 F.3d at 219. Indeed, in *Hincapie-Nieto*, the INS, contrary to what it asserts here, assured the court that there was no constitutional infirmity with this interpretation because a non-citizen in executive detention could obtain judicial review of his or her deportation order by habeas corpus. *See* 92 F.3d at 31.

Furthermore, in *Jean-Baptiste*, we rejected the very same argument presented by the INS in this case. There, the INS argued that it was unnecessary to preserve habeas jurisdiction to avoid a constitutional question because review of constitutional questions remained available under the INA. Relying on our prior decision in *Hincapie-Nieto*, we held that the INA as amended by IIRIRA takes away that review for legal residents ordered removable because of prior convictions. *See Jean-Baptiste*, 144 F.3d at 219-20. The INS's arguments were "not well taken" in that case, *see id.* at 220, and are received with the same skepticism here. There is nothing in IIRIRA's permanent rules or their legislative history

that indicates that Congress excepted review of substantial constitutional questions under INA § 242.

In addition, the INS's formulation of the review required by the Constitution falls short of the review that we held in *Henderson* is mandated. We found there that even a partial repeal of habeas jurisdiction to hear an executively detained alien's statutory challenges may violate the Suspension Clause. *See* 157 F.3d at 120. In that case, we reasoned that the INS's articulation of the review that is required under the Constitution:

> is drawn from the very different context of successive federal habeas corpus petitions by prisoners in state custody who have already had one or more opportunities for full judicial process and appeals in the state system, with an opportunity for further review in the Supreme Court by a writ of certiorari, and one or more opportunities for review in the federal judiciary on their first habeas petition.

Id. (*quoting Goncalves*, 144 F.3d at 118 n.8). The case of a legal permanent resident alien, in contrast, arises in the setting of executive detention, "a context in which the petitioner[ ] ha[s] never had [his or her] claim[ ] review[ed] by any court, federal or state." *Id.* In this context, circuit courts, including this one, have noted that review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law. *See Henderson*, 157 F.3d at 121 (*citing Gegiow v. Uhl*, 239 U.S. 3, 3 (1915); *Brownell v. We Shung*, 352 U.S. 180, 182 n.1 (1956)); *Goncalves*, 144 F.3d at 124 (citing numerous immigration cases that have considered claims of statutory right)); *see also Mayers*, 175 F.3d at 1300 (citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78 (1957)); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)).

Furthermore, the language of 28 U.S.C. § 2241 does not contemplate that the writ only extends to a person in custody in violation of the Constitution. Rather, the statute also provides habeas jurisdiction over claims that a person is in custody in violation of federal laws and treaties. *See* 28 U.S.C. § 2241 (providing that the writ of habeas corpus shall extend to a person in custody "in violation of the Constitution or laws or treaties of the United States"). Hence, the literal terms of 28 U.S.C. § 2241 contemplate statutory claims against executive detention.

The substitution of judicial review only of substantial constitutional questions for the habeas review guaranteed under 28 U.S.C. § 2241 therefore does not cure the constitutional infirmity that could result from a repeal of the habeas statute. Without habeas jurisdiction to review final orders, there is currently no judicial review at all of a removal order issued against a non-citizen who is ordered removable because he or she committed a certain crime. Because habeas jurisdiction is constitutionally required where the immigration laws have been interpreted to bar other forms of judicial review under § 242(a)(2)(C), our decision that habeas review remains for a criminal alien's legal challenge to his or her deportation order obviates the profound constitutional questions that would arise if we concluded that all judicial review had been eradicated.

Although not all challenges that an alien may launch against his removal are cognizable under habeas, purely legal statutory and constitutional claims are within § 2241's scope. Thus, a federal court's habeas review includes the claim raised by the petitioners in these consolidated cases—that IIRIRA does not apply to bar the availability of § 212(c) relief for convictions that occurred prior to its enactment. The petitioners challenge the government's refusal to consider an application

for a waiver from deportation and do not ask the court to determine whether the BIA exercised its discretion appropriately. Their claim is a purely legal question that is cognizable under the habeas statute.

We note, as did the Third Circuit in *Liang*, that if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review. This would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review. However, we disagree with the Eleventh Circuit's interpretation of INA § 242(a)(2)(C) in *Richardson II* as permitting review of both statutory and constitutional claims. Although this interpretation may represent sound legislative policy, we reiterate that we do not read IIRIRA or our prior cases to permit such review under INA § 242(a)(2)(C).

Notwithstanding, the question raised by the petitioners is a purely legal matter appropriate for a court, rather than the BIA, to determine. *See Mayers*, 175 F.3d at 1300; *see also Goncalves*, 144 F.3d at 113; *LaGuerre*, 164 F.3d at 1041. It is the type of question that, once answered by the highest court, is answered for all cases that follow presenting the same issue. We therefore believe our decision today that a legal resident alien's pure legal challenges are preserved via habeas corpus to his or her removal order serves to advance Congress's goal of streamlining judicial review.

III. CONCLUSION

We affirm our adherence to the proposition that had Congress intended to strip federal courts of habeas jurisdiction under 28 U.S.C. § 2241 over criminal aliens' statutory and constitutional challenges, it would have done so by making its intent explicit. Because the permanent rules do not mention a repeal of 28 U.S.C. § 2241 or habeas jurisdiction generally, we hold that they do not deprive a federal court of its habeas jurisdiction under § 2241 to review the purely legal claims of criminal aliens against final orders of removal. Because we lack jurisdiction under INA § 242(a)(2)(C) over the petitions for review brought by Calcano-Martinez, Madrid, and Khan challenging their final orders of removal, we dismiss the petitions without prejudice to Khan's pending petition or to the same claims being brought by Calcano-Martinez and Madrid under habeas corpus.

Appendix B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Buffalo, New York

File No.: A 30 151 244
July 16, 1997

In the Matter of
DEBORIS CALCANO-MARTINEZ

Respondent

IN REMOVAL PROCEEDINGS

CHARGES:

APPLICATION: None.

ON BEHALF OF RESPONDENT:

Ann Doebler, Esquire

ON BEHALF OF SERVICE:

Juliam Miriam, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent admitted that she is not a citizen or a national of the United States but a native and citizen of the Dominican Republic who entered the United States at New York, New York on May the 3rd, 1971 as a lawful permanent resident. The respondent neither admitted or denied the final allegation in the Notice To Appear that she was convicted in the Supreme Court of the State of New York, New York for the offense of attempted criminal sale of a controlled substance in the third degree, to wit: heroin, in violation of Section 110/220.39 of the New York State Penal Code.

The Immigration Service in support of that allegation offered Exhibit 9, which is a sentence and commitment order establishing the respondent was, in fact, convicted on April the 24th, 1996 of the attempted criminal sale of a controlled substance and she was sentenced as a result of that. Accordingly, I find that the respondent is deportable as charged in the Notice To Appear, both pursuant to Section 237(a)(2)(A)(iii) of the Immigration & Nationality Act, as amended, in that after admission she has been convicted of an aggravated felony as defined in Section 101(a)43) of the Act. I also find that she is deportable as charged pursuant to Section 237(a)(2)(B)(i) of the Immigration & Nationality Act as amended in that at any time after admission she was convicted of a violation of a law regulating a controlled substance as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802, and this was for other than a single offense involving possession of marijuana for one's own use of 30 grams or less. I also find that because of the charges of deportability which have been established, that the respondent is ineligible for any form of relief from deportation.

Accordingly, the following order is entered.

ORDER

IT IS HEREBY ORDERED the respondent be deported from the United States to Dominican Republic.

THOMAS J. PULLIN
Immigration Judge

July 16, 1997

A 30 151 244

Appendix C

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A30 151 244 - Buffalo

Dec 30 1997

In re: DEBORIS CALCANO-MARTINEZ
a.k.a. Deboris Calzano a.k.a. Deborah Martinez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Anne E. Doebler, Esquire
International Institute of Buffalo, Inc.
864 Delaware Avenue
Buffalo, New York 14209-2093

ON BEHALF OF SERVICE:

Joy A. Merriman
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

In a decision dated July 16, 1997, an Immigration Judge found the respondent subject to removal on the

charges set forth above and determined that the respondent is ineligible for relief from removal. The respondent has appealed. The appeal will be dismissed.

The respondent is a native and citizen of the Dominican Republic who was admitted to the United States on May 3, 1971, as a lawful permanent resident. The Immigration and Naturalization Service submitted evidence that on April 24, 1996, the respondent pled guilty to the offense of attempted criminal sale of a controlled substance, to wit: heroin, in violation of section 110/220.39 of the New York State Penal Law (Exhibit 9).

On appeal, the respondent contends that the Immigration Judge erred in denying her the opportunity to apply for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent contends that the retroactive application of recent immigration legislation to her case would result in manifest injustice.

Initially, we find that the respondent was properly placed in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, by the filing of a Notice to Appear, Form 1-862, with the Immigration Court on June 16, 1997. *See* 8 C.F.R. § 239.1(a) (1997). Although relief from deportation under section 212(c) of the Act is unavailable to an alien in removal proceedings, cancellation of removal under section 240A(a), 8 U.S.C. § 1229b(a), is available to certain lawful permanent residents.[1] The respondent is ineligible for cancellation of removal due to her conviction of an aggravated felony. *See* section 240A(a)(3) of the Act. At the removal hearing, the respondent, through counsel, stated that she did not believe that she is statutorily eligible for any form of

[1] Section 212(c) of the Act was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

relief from removal, and she does not indicate any relief for which she may be eligible in her pleadings on appeal Tr. at 11).

Contrary to the respondent's argument on appeal that the amendments to section 212(c) of the Act should not apply retroactively to her case, section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-131, 110 Stat. 1214 ("AEDPA"), rendering section 212(c) relief unavailable to aliens convicted of certain crimes, has been held to apply retroactively to section 212(c) applications pending on the effective date of AEDPA. *See Matter of Soriano*, Interim Decision 3289 (BIA 1996, A.G. 1997).[2] Moreover, despite respondent's contentions on appeal regarding the injustice of recent immigration law, this Board does not have jurisdiction to rule upon the constitutionality of the Act and the regulations. *See* section 103 of the Act, 8 U.S.C. § 1103; 8 C.F.R. § 3.1 (1997); *Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995); *Matter of Feuntes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, at 532 (BIA 1992).

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

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[2] We note that the amendment to section 212(c) of the Act by section 440(d) of AEDPA relates to aliens in deportation proceedings; the respondent is in removal proceedings, in which section 212(c) relief is not available.

Appendix D

IMMIGRATION COURT
Red Schoolhouse Road
Fishkill, NY 12524

Case A91-251-796
94-A-6379

In the Matter of
*S-MADRID, SERGIO

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Oct 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Oct 1, 1997

Appeal: RESERVED Appeal Due By: Oct 31, 1997

/s/ MITCHELL A. LEVINSKY
MITCHELL A. LEVINSKY
Immigration Judge

CLD

Appendix E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Downstate Correction Facility
Fishkill, New York

File No.: A 91 251 796 October 1, 1997

In the Matter of
SERGIO MADRID,
Respondent

In REMOVAL Proceedings

CHARGES: Immigration and Nationality Act, Section 237(a)(2)(A)(iii), alien who has been convicted of an aggravated felony, Immigration and Nationality Act, Section 237(a)(2)(B)(i), alien who has been convicted of a violation of any law or regulation relating to a controlled substance

APPLICATION: None

ON BEHALF OF RESPONDENT:

Alan Strauss, Esquire
Law offices of Kerry Bretz & Associates
299 Broadway, Suite 810
New York, New York 10007

ON BEHALF OF SERVICE:

Adam Opaciuch, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 25-year old male, native and citizen of Mexico who entered the United States originally without being inspected at an unknown time and place. On December 20th, 1989, the respondent's status was adjusted to that of a lawful permanent resident, pursuant to Section 245(a) of the Immigration and Nationality Act, at New York, New York.

On September 6th, 1994, the respondent was convicted in the State of New York, the County Court, County of Rockland, for the offense of the criminal sale of a controlled substance in the second degree; that substance being cocaine.

On June 11th, 1997, a Notice to Appear was issued charging the respondent with removability pursuant to the above-captioned provisions of the Immigration and Nationality Act. The respondent, through counsel, has admitted all of the allegations of fact c ·ained in the Notice to Appear and has conceded removability.

In support of the allegations of fact, the Immigration Service provided a copy of the respondent's Form I-181, Memorandum of Creation of a File of Lawful Permanent

Residence and a copy of the respondent's conviction records. Based on the respondent's concessions and the evidence of record, removability has been established by evidence which is clear, convincing and unequivocal for the charges set out in the Notice to Appear. *See Woodby v. INS*, 385 U.S. 276 (1966).

Mexico has been designated the country of removal.

The respondent has not submitted any application for relief from removal, but would, if allowed, apply for relief under Section 212(c) of the Immigration and Nationality Act. Section 212(c) of the Immigration and Nationality Act provides aliens lawfully admitted for permanent residence, who have a lawful unrelinquished domicile of seven consecutive years may be admitted to the United States in the discretion of the Attorney General without regard to most grounds of exclusion. If allowed, and if granted, the Section 212(c) waiver would allow this respondent to remain in the United States.

However, the respondent appears to be statutorily ineligible for the relief sought and the request to file relief under Section 212(c) must be pretermitted by the Court. First, as regards to Section 212(c) relief, the Court believes that even if he were in deportation proceedings, rather than removal proceedings, the respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(b) of the Immigration and Nationality Act, for having been convicted of the criminal sale of a controlled substance.

As such, the respondent comes within the preview of Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996. That section stated that an alien who has been convicted of an aggravated felony, or a violation of any law or regulation relating to a controlled substance, is barred from relief under Section 212(c) of the Immigration and Nationality Act.

In her decision, in *Matter of Soriano*, the Attorney General stated that the provisions of Section 440(d) of the AEDPA must be applied to aliens in deportation proceedings applying for Section 212(c) relief on or after April 24th, 1996. Thus, this Court is bound to follow the decision of the Attorney General and deny such relief because the respondent is statutorily ineligible for relief under Section 212(c) of the Act, because of his conviction for an aggravated felony.

Notwithstanding the respondent's statutory ineligibility pursuant to the *Matter of Soriano*, and the AEDPA, the Court believes this respondent cannot apply for Section 212(c) relief in removal proceedings. When Congress created the removal proceedings in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Section 309(c) of that Act, provided that under the transition rules, deportation relief is only available in deportation proceedings and deportation remedies cannot be had in removal proceedings. Conversely, removal relief and relief available in removal proceedings could not be had in deportation proceedings.

The Notice to Appear in these proceedings was filed with the Immigration Court, June 11th, 1997. Notwithstanding the fact that respondent's conviction pre-dates the institution of hearings, and the institution of removal laws, this Court must apply removal laws to this respondent. In doing so, the respondent is statutorily ineligible for cancellation of removal under Section 240(A) of the Immigration and Nationality Act, as amended, because that Section of law provides that cancellation of removal is not available to an alien who has been convicted of an aggravated felony.

Therefore, the respondent is statutorily barred from relief both under removal laws and deportation laws, and the Court is not aware of any relief that is available to this respondent. Notwithstanding the merits of any argu-

ments made by counsel for the respondent, the Court is constrained to follow the Board of Immigration Appeals and the Attorney General in their decisions and cannot adopt the decisions of District Court Judges that are contrary to those of the Attorney General and the BIA.

Therefore, the Court believes that the respondent is without any relief from removal and the following order will be entered:

ORDER:

IT IS HEREBY ORDERED that the respondent's verbal request for relief under Section 212(c) of the Immigration and Nationality Act is denied and the respondent is hereby ordered removed from the United States to Mexico on the charges contained in the Notice to Appear.

Dated: October 1, 1997

MITCHELL A. LEVINSKY
U.S. Immigration Judge

Appendix F

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A91 251 796 - Fishkill, New York

Date: May 5, 1998

In re: SERGIO MADRID

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Kerry W. Bretz, Esquire
Bretz & Associates, P.C.
299 Broadway, Suite 810
New York, New York 10007

ORDER:

PER CURIAM. We agree with the Immigration Judge that the record in this case establishes by clear, unequivocal, and convincing evidence, that you are subject to removal as charged. *See Woodby v. INS*, 385 U.S. 276 (1966). No arguments presented during the hearing or on appeal would cause us to disturb this finding.

Regarding relief, we note that you were placed in removal proceedings. Since you are in removal proceedings, a waiver of inadmissibility under section 212(c) is not a form of relief that is available. *See* section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of

Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-596 ("IIRIRA"). Moreover, you are statutorily ineligible for cancellation of removal pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b(a), because you have been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act; 8 U.S.C. § 1101(a)(43)(B).

You have argued on appeal that AEDPA is unconstitutional. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

Accordingly, your appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

Appendix G

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

Case No.: A 41 602 519
Docket: Danbury, CT

In the Matter of:
KHAN FAZILA

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 7/24/97. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☒ The respondent was ordered removed to Guyana.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

- ❒ Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to_____ or _____.
- ❒ Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Proceedings were terminated.
- ❒ The application for adjustment of status under Section (216)(216A)(245)(249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
- ❒ Respondent's status was rescinded under Section 246.
- ❒ Other _____

☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ILLEGIBLE]
Immigration Judge

Date: 7/24/97

[Handwritten date:] Aug. 25, 997

Appeal: RESERVED/WAIVED (A/I/B)
[word "Reserved" and letter "A"
in the line above have been circled by hand]

Appendix H

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File A 41 602 519

Matter of
KHAN FAZILA,

Respondent

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before WILLIAM P. JOYCE, Immigration Judge

DATE:

PLACE: Danbury, Connecticut

Transcribed by DEPOSITION SERVICES, INC.
At Rockville, Maryland

OFFICIAL INTERPRETER:

LANGUAGE:

APPEARANCES:

FOR THE IMMIGRATION AND NATURALIZATION SERVICE:

Kim Bingham, Esquire

FOR THE RESPONDENT:

William Bretz, Esquire

JUDGE FOR THE RECORD

This is the United States Immigration Court in Danbury, Connecticut. We're here in the matter of Fazila Khan. File number A 41 602 519.

Miss Khan is being represented telephonically by Mr. William Bretz (phonetic sp.). The Government is being represented by Mr. Kim Bingham (phonetic sp.).

Mr. Bretz has provided pleadings in this case in that Miss Khan acknowledges proper of the service of the Notice to Appear. Agrees to the admissions in the order to Show Cause and concedes that she's the person in the Order to Show Cause and she acknowledges that she's been advised of the purposes of the hearing. She waives a formal reading of the hearing. Admits the factual allegations four through six.

JUDGE TO MR. BRETZ

Q. Now what's your position on this one, Mr. Bretz?

A. Oh, we're denying that that is a conviction for an aggravated felony and that Miss Khan would remain nevertheless eligible for relief.

Q. Now isn't this—well, what's the sentence in this case?

A. (Indiscernible).

MR. BINGHAM TO JUDGE

Q. Your Honor, if I may? We'll offer the convictions.

JUDGE TO MR. BRETZ

Q. Well let me just say, I'm now—Mr. Bingham is handing around copies of the conviction record. Which will be Exhibit 1. She pleaded to an information. Is this—is your position, Mr. Bretz, this is a misdemeanor?

A. Yes.

JUDGE TO COUNSEL

Q. What was the sentence for this? Anybody.

A. (Mr. Bretz) I believe it was for four months.

A. (Mr. Bingham) Four months under page two, Your Honor.

JUDGE TO MR. BINGHAM

Q. Okay. Mr. Bingham, what's your position on this?

A. Well, I do have the Title 21 U.S. Code and I do believe that that would be a felony conviction under Title 21, because it would be punishable for more than a year. Which would then qualify it as a felony and since it's a drug conviction under Title 21, it would automatically be a aggravated felony.

Q. Is it, is it what the—what you're sentenced to or is it what—

A. No, it's the type of crime. If it's Federal felony offense under Title 21—

Q. All right. Well that's the issue, why don't you look it up?

A. Right.

Q. I don't how you can get four months—well, maybe.

MR. BRETZ TO JUDGE

Q. Your Honor, I'd be happy to articulate our argument in writing.

A. Well, Mr. Bingham now is looking at the statute. We'll take a look at it.

MR. BINGHAM TO JUDGE

Q. Can we go off the record for a moment?

JUDGE TO MR. BRETZ

Q. We're going off the record for a second.

(OFF THE RECORD)

(ON THE RECORD)

HEARING CONTINUED

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File A 41 602 519

Matter of
KHAN FAZILA,

Respondent

IN REMOVAL PROCEEDINGS
Transcript of Hearing

Before WILLIAM P. JOYCE, Immigration Judge

DATE:

PLACE:

Transcribed by DEPOSITION SERVICES, INC.
At Rockville, Maryland

OFFICIAL INTERPRETER:

LANGUAGE:

APPEARANCES:

FOR THE IMMIGRATION AND NATURALIZATION SERVICE:

Kim Bingham, Esquire

FOR THE RESPONDENT:

Irwin Berowitz, Esquire

JUDGE FOR THE RECORD

This the Immigration Judge William Joyce. We're here in the matter of Fazila Khan. We've been discussing the matter of the issue that I had asked to be briefed as to whether or not her conviction, her violation of Section 21 U.S.C. 43(b) and (d) brings her within the purview of Section 237(a)(2)(A)(3) in that she's been convicted of an aggravated felony.

It's a technical discussion. It's been well briefed by both parties. I pointed out to the parties, the Board has recently ruled that in Onray Juan Bautista-Hernandez (phonetic sp.) that an individual who was charged as an accessory after the fact did not come within the drug trafficking purview. However, it was my conclusion based on the argument of both sides and in this instance it does and I so hold.

We also then discussed the issue of whether or not she'd be eligible for cancellation of removal and it appears that her conviction of a aggravated felony would bar the availability of cancellation. However, it's a close case and that this my be something the Board may want to address.

Now, with that being said.

Representing Miss Khan is Mr. Irwin Berowitz.

JUDGE TO MR. BEROWITZ

Q. And Mr. Berowitz, you wanted to get something on the record?

A. Yes, a couple of things. Thank you. It's our position that Miss Khan remains eligible for 212(c) relief for the following reasons: All of her acts and her arrests occurred prior to April 24, 1996 and under the holdings of Mohecka v. Reno (phonetic sp.), Judge Winestein's (phonetic sp.) recent decision and Gueshill v. Reno (phonetic sp.), Judge Chen's decision from last week in the Southern District. We believe that—

Q. She—it shouldn't be—

A. (Indiscernible)—

Q. Yeah.

A. Any changes in the law should not be applied retroactively to this respondent.

Q. Let me ask you this counsel?

A. Yes.

Q. Did Judge Chen adopt the same general rational of Judge Winestein?

A. Yes, he did.

Q. Those cases headed up the Circuit?

A. The Mohecka decision can be appealed up until, I think the date is, September 3. Neither party has appeal at this point. And the Gueshill decision will probably be appealed by the Government.

Q. Where did—those cases then just stand for what they were stated in the particular case. I mean there's no precedent there. Am I not correct on that?

A. Correct.

Q. I see. It would be nice if a Circuit would rule on these.

A. All right these same issues are before the 2nd Circuit at this time. It's possible that all—

Q. Uh-huh.

A. Argument will be heard as early as the week of October 13. But I understand that's not really quite set in stone.

Q. I see. So, okay, if, in fact, the 2nd Circuit was to rule favorably for you, this case would have to revisited. Well, all right. As those cases are not precedent at this point and we're bound by Board precedent. I'm going to rule that she's not eligible for 212(c) relief. She is an aggravated felon and therefore, that'll be my ruling. And counsel, you're going to reserve appeal?

A. Yes.

Q. And your, let's see, you need to get that back to the Board by August 25, 1997 and I appreciate you briefing that issue and it'll be interesting to see where we go with it.

A. okay.

MR. BINGHAM TO JUDGE

Q. Your Honor?

JUDGE TO MR. BEROWITZ

Q. All right. Now Mr. Bingham wants to make an observation.

MR. BINGHAM TO JUDGE

Q. Oh, just first of all. I assume counsel is referring to cancellation of removal as oppose to 212(c) since we have a Notice to Appear in this case and not a OSC.

A. Well, I think he's arguing that it doesn't matter. That if, in fact, your crimes were committed before the passage of the Act. It's maybe—

JUDGE TO MR. BEROWITZ

Q. And I don't want to put words in your mouth.

A. You're right, Judge Joyce. That is our position.

Q. That she shouldn't be in cancellation. She should be in—she should be—well, the end of the old law.

MR. BINGHAM TO JUDGE

Q. Also could we have the (indiscernible)

MR. BEROWITZ TO JUDGE

Q. Are we still connected?

A. Yes.

Q. Okay.

MR. BINGHAM TO JUDGE

Q. Could we have the conviction marked as an exhibit?

A. Yeah.

JUDGE FOR THE RECORD

Just for the record purposes, I'm going to go ahead, I'm going to mark the 861, 862 as Exhibit 1. I'm going to mark the conviction as Exhibit 2. The briefs stand for themselves.

And there we are.

JUDGE TO COUNSEL

Q. Does any of the parties have anything else?

A. (Mr. Berowitz) Nothing further today.

Q. Okay.

JUDGE TO MR. BEROWITZ

Q. And the country that she'd be removed to is Ghana?

A. Yes.

Q. Okay. All right. Well thank you very much, sir, and we'll see what happens.

A. Okay.

Q. Thanks.

A. I have a couple of other with you today, should I stay on the line or?

Q. Well, half the problem is getting people out here. Which of the two do you have?

A. Let's see. Odech (phonetic sp.) 832.

Q. It's 8. Could you repeat that, please?

A. Sorry, that's a mistake. I got, let's see. Medina (phonetic sp.) 689.

Q. Six—okay.

A. And I think Amora (phonetic sp.) is on the calendar that's 515.

Q. Yeah, 515. 515. I'm not sure either one of then are out there, but—

A. Oh, okay.

Q. But Amara near the top of our list so. Are you going to be for the rest of the morning?

A. Yes.

Q. Okay. We'll call you—let me just see.

JUDGE TO UNIDENTIFIED PERSON

Q. Is Amara here?

A. Yes.

Q. Okay. Let's send in Amara in about one minute.

JUDGE TO MR. BEROWITZ

Q. Now, let me just explain to Miss Khan.

JUDGE TO MISS KHAN

Q. You've heard all this discussion and basically, what we've done here is—I've gone ahead and ordered that you be removed to Ghana at the conclusion of your sen-

tence. However, as you can see, there's a lot of legal arguments going on as to whether or not you're entitled to some kind of relief and the courts are now examining this issue and I've suggested to counsel that because your case is a close one, he may want to bring it up with the appellant body, the people who review my work. And that's what we've done here. The will go up to them and they'll take a look at it. Okay.

A. All right.

So there still may be hope for you. Okay. And you understand that?

A. Yes, I understand.

Q. Okay.

MR. BEROWITZ TO JUDGE

Q. I'm holding Judge Joyce.

A. Okay. And counsel, Mr. Berowitz, I take it you'll speak to Miss Khan at a later day.

JUDGE TO UNIDENTIFIED PERSON

Q. All right. Well, we're done anyway. We'll have to call him back.

A. Yes.

JUDGE TO MISS KHAN

Q. All right. So he'll talk to you.

A. Okay.

Q. And let me give you a copy of this.

UNIDENTIFIED PERSON TO JUDGE

Q. Should be give her one?

A. Yes.

Q. or just mail it to the attorney?

A. No.

Q. I'll give her the last one.
A. Yeah, give her one too.
Q. Now another one of Berowitz's clients is outside.
A. Okay. So let's bring that gentlemen in.
Q. 515.

UNIDENTIFIED PERSON TO UNIDENTIFIED PERSON

Q. Yes? Take you can have one.
A. (Indiscernible).

JUDGE TO UNIDENTIFIED PERSON

Q. And I don't see a—yes, it is. All right. And we'll go him back.
A. 515.

JUDGE TO UNIDENTIFIED PERSON

Q. We're calling your lawyer.

HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before WILLIAM P. JOYCE in the matter of:

FAZILA KHAN
A 41 602 519
Danbury, CT

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ LINDA S. WADE
(Linda S. Wade, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

December 13, 1997
(Completion Date)

Appendix I

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A41 602 519 - Danbury Date: May 28 1998

In re: FAZILA *KHAN*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kerry W. Bretz, Esquire
Bretz & Associates
299 Bradway, Suite 810
New York, New York 10007

ON BEHALF OF SERVICE:
Robert K. Bingham
Special Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]—
Convicted of aggravated felony

In a decision dated July 24, 1997, an Immigration Judge found the respondent subject to removal on the charge set forth above and determined that the respondent is ineligible for relief from removal. The respondent has filed a timely appeal. The appeal will be dismissed.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of Guyana who was admitted to the United States as a lawful permanent resident on or about September 2, 1987. The respondent admitted that on February 13, 1997, she was convicted in United States District Court, Eastern District of New York, for the offense of use of a telephone to facilitate the distribution of heroin, in violation of 21 U.S.C. §§ 843(b) and (d). Subsequent to a motion for downward departure, the respondent was sentenced to 4 months imprisonment. *See* Tr. at 1; Exh. 2.

On appeal, the respondent presents the following arguments. First, she asserts that her conviction does not support the charge of deportability, because the Immigration and Naturalization Service did not clearly and convincingly establish that drug trafficking was an integral element of her offense. Thus, she denies that she is deportable as charged under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act. Second, she argues that, by finding her ineligible to apply for relief from removal under former section 212(c) of the Act, the Immigration Judge impermissibly subjected her to a new disability for past conduct, in violation of the principle against retroactive application of a new law to past conduct enunciated in *Landgraf v. USI Products*, 511 U.S. 244 (1994). Third, she argues that the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) violates equal protection by barring relief for lawful permanent residents in removal proceedings while allowing similarly situated persons to pursue such relief if they are in either deportation or exclusion proceedings.

In response, the Service argues that the respondent was convicted of a controlled substance offense that is punishable as a felony under Title 21 of the United States Code, and which therefore is a drug trafficking crime. Consequently, the Service contends, she is deportable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony (as defined in section 101(a)(43)(B) of the Act).

II. THE RESPONDENT'S CONVICTION

The respondent was convicted of use of a telephone to facilitate the distribution of heroin, pursuant to 21 U.S.C. §§ 843(b) and (d). This statute, in pertinent part, provides as follows:

> (b) Communication facility
>
> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(d) Penalties

(1) . . . any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to term of imprisonment of not more than 8 years, a fine of $60,000, or both.

In section (b) above, the language "this subchapter or subchapter II of this chapter" refers to the Controlled Substances Act, Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242.

III. DEPORTABILITY UNDER SECTION 241(A)(2)(A)(iii) OF THE ACT

The respondent concedes that the statute under which she was convicted, 21 U.S.C. § 843(b), indisputably relates to controlled substances. We note that we have held that various inchoate or preparatory crimes are controlled substance violations, within the meaning of the Act, when the underlying substantive crime involves a drug offense. *See Matter of Batista-Hernandez*, Interim Decision 3321 (BIA 1997). Many inchoate crimes "relate to" an underlying controlled substance offense because, although such crimes are not lesser included offenses of controlled substance violations, they nonetheless involve acts closely related to the culmination of the substantive controlled substance offense. *Id.* at 5. We

specifically have held that a conviction for "facilitation" of a drug offense is itself a controlled substance violation. *Matter of Del Risco*, 20 I&N Dec. 109 (BIA 1989); *see also Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992) (solicitation); *Matter of Bronsztein*, 15 I&N Dec. 281 (BIA 1974) (attempt). We concur that the respondent's facilitation offense is a controlled substance violation.

The respondent maintains, however, that a conviction under 21 U.S.C. § 843(b) does not necessarily involve drug trafficking. She disputes the Service's contention that every offense enumerated within the Controlled Substances Act is also a drug trafficking crime. In support of her argument, she cites *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994), in which the Board held that a single conviction for possession of a controlled substance under Louisiana law was not analogous to a conviction under 21 U.S.C. § 844(a), and thus did not constitute an aggravated felony conviction.[1] Accordingly, the respondent maintains that if she has not been convicted of a drug trafficking crime as defined in section 101(a)(43)(B) of the Act, she is not subject to removal as an aggravated felon under section 237(a)(2)(A)(iii) of the Act.

Addressing the issue of deportability under section 241(a)(2)(A)(iii) of the Act, we note that section 101(a)(43)(B) of the Act, as it applies to the respondent, defines an "aggravated felony" as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including a drug trafficking

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[1] *But see Matter of L-G-*, Interim Decision 3254 (BIA 1995), in which the Board held (1) that a federal definition applies to determine whether a crime is a "felony," and thus whether it is an "aggravated felony"; and (2) that, for immigration purposes, a state drug offense qualifies as a "drug trafficking crime" (and hence an aggravated felony) if it is punishable as a felony under federal law.

crime (as defined in section 924(c) of Title 18, United States Code)." Section 924(c)(2) of Tide 18 defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." *See Matter of L-G-*, Interim Decision 3254 (BIA 1995). Because the respondent was convicted of an offense that is punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the remaining issue to determine is whether her crime is properly characterized as a "felony."

The Controlled Substances Act at 21 U.S.C. § 802(13) (1994) provides: "As used in this subchapter: The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." The definitions under 21 U.S.C. § 802 also apply to the Controlled Substances Import and Export Act, *see* 21 U.S.C. § 951(b) (1994), and the Maritime Drug Law Enforcement Act, *see* 46 U.S.C. App. § 1903(i) (1994). Because the respondent's conviction was for a federal offense, we look to the federal definition of felony to resolve our query.[2]

Under federal law, a felony is an offense that may be punished by a term of imprisonment that exceeds one year. 18 U.S.C. § 3559(a); *see also Jenkins v. INS*, 32 F.3d 11, 14 (2d Cir. 1994). As punishment for her offense, the respondent received a sentence of only 4 months imprisonment. *See* Exh. 2. However, the statute under which she was convicted provides that her crime is *punishable* by "a term of imprisonment of not more

---

[2] We note, however, that we also have held that a state drug offense qualifies as a "drug trafficking crime" if it is punishable as a felony under the federal drug laws. *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barre*, 20 I&N Dec. 171 (BIA 1990).

than 4 years, a fine of not more than $30,000, or both." 21 U.S.C. § 843(d)(1). Thus, because the crime *may be punished* by imprisonment of more than a year, it is a felony. Moreover, we note that section 101(a)(43)(B) of the Act, which defines as an "aggravated felony" illicit trafficking in a controlled substance (including drug trafficking crimes), does not require that any minimum sentence of imprisonment be imposed in order that a conviction qualify as an aggravated felony. *Compare, e.g.*, section 101(a)(43)(F) of the Act (crime of violence for which sentence of at least one year imposed); section 101(a)(43)(G) of the Act (theft offense for which sentence of at least one year imposed); section 101(a)(43)(J) of the Act (racketeering or gambling offense for which sentence of at least one year imposed); section 101(a)(43)(S) of the Act (obstruction of justice offense for which sentence of at least one year imposed). Consequently, we find that the respondent's crime is properly characterized as an "aggravated felony" under section 101(a)(43)(B) of the Act, and that she therefore is deportable under section 241(a)(2)(A)(iii) of the Act.

IV. RETROACTIVITY AND EQUAL PROTECTION ARGUMENTS

The respondent also argues on appeal that the Immigration Judge, by finding her ineligible for relief from removal under former section 212(c) of the Act, violated the principle against retroactive application of a new law to past conduct. Upon review, we find that the Immigration Judge correctly applied the law. In amending the definition of "aggravated felony" in section 101(a)(43) of the Act, Congress in IIRIRA specifically provided that the provision applies regardless of the date of the conviction: "[n]otwithstanding any other provision of law (including any effective date), the term applies

regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." *See Matter of Soriano* Interim Decision 3289 (A.G., Feb. 21, 1997) (amendment to section 212(c) of the Act applied to respondent, who had been convicted in 1992, which was before enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and before deportation proceedings commenced). Thus, we find no error in the Immigration Judge's determination that the respondent is ineligible for relief, including cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), owing to her conviction for an aggravated felony. *See* section 240A(a)(3) of the Act.

Finally, the respondent also argues on appeal that IIRIRA violates equal protection by barring relief for lawful permanent residents in removal proceedings. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *see also* section 103 of the Act, 8 U.S.C. § 1103. Moreover, we reject the respondent's argument that the Board should apply the holding in *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997) and *Yesil v. Reno*, 973 F. Supp. 372 (S.D.N.Y. 1997) (section 440(d) of AEDPA not retroactive). The Board of Immigration Appeals is not bound to follow the published decisions of a United States district court in cases arising in the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

V. CONCLUSION

We find that the respondent was properly placed in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, by the filing of a Notice to Appear, Form I-862, with the Immigration Court on May 13, 1997 (Exhibit 1). *See* 8 C.F.R. § 239.1(a) (1997). Furthermore, we conclude that the Immigration Judge properly found the respondent subject to removal under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who, at any time after entry, has been convicted of an aggravated felony. *See* section 101(a)(43)(B) of the Act. We concur also with the Immigration Judge's determination that the respondent is not eligible for any form of relief from removal. We note that cancellation of removal under section 240A(a), 8 U.S.C. § 1229b(a), is available to certain lawful permanent residents. However, the respondent is ineligible for cancellation of removal owing to her conviction of an aggravated felony. *See* section 240A(a)(3) of the Act.

The respondent has not established eligibility for any form of relief from removal. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[ILLEGIBLE]
FOR THE BOARD

Appendix J

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. 1, § 9, C1.2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. U.S. Constitution, Art. III provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; . . . .

3. U.S. Constitution, Amendment V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

4. Prior to April 24, 1996, section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within

the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—

* * * * *

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

5. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (to be codified), provided in pertinent part:

Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—

* * * * *

(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section

[1251](a)(2)(A)(i), shall not be subject to review by any court.

6. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

7. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (to be codified), provided:

---

[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 82a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Sec-

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. IV 1998), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in

---

tion 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 81a-84a, *infra*.

subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(2)(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 1227(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i).

* * * * *

(b)(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in Judicial review of a final order under this section.

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

execute removal orders against any alien under this chapter.

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

> **CRIMINAL ALIEN REMOVAL.**
>
> (a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:
>
> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered

[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 82a, *infra*.

by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)-(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of

APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).

* * * * *

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 110(a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)-(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

13. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section

212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

14. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless

* * * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

SUPREME COURT, U.S.
FILED
DEC 22 2000
CLERK

(3)

No. 00-1011

In the Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction on direct petitions for review over petitioners' challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

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In the Supreme Court of the United States

No. 00-1011

DEBORIS CALCANO-MARTINEZ, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) will be reported at 232 F.3d 328. The decisions of the Board of Immigration Appeals (Pet. App. 37a-39a, 48a-49a, 66a-74a) and the immigration judges (Pet. App. 34a-36a, 40a-47a, 50a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. On November 21, 2000, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 30, 2000. The petition for a writ of certiorari was filed on December 21, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien is deportable from the United States if he has been convicted at any time after his admission of an "aggravated felony," as that term is defined in the INA (see 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999); 8 U.S.C. 1101(a)(43) (1994 & Supp. V 1999)), or of an offense involving controlled substances (see 8 U.S.C. 1227(a)(2)(B)(i) (Supp. V 1999)). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had had a lawful unrelinquished domicile in this country for seven years, and that, if he had been convicted of an aggravated felony, he had not served a term of imprisonment of five years or more. See 8 U.S.C. 1182(c) (1994).

If the Attorney General denied relief from deportation under Section 1182(c), then the alien could chal-

lenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances, an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section, including aliens convicted of aggravated felonies and controlled substance offenses, regardless of the duration of the imprisonment actually served. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) and (B) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) and (B) (Supp. V 1999))).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. AEDPA Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses enumerated in Section 440(d) "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277 (adding a new subsection (a)(10) to 8 U.S.C. 1105a (1994)). At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY

REVIEW BY HABEAS CORPUS," repealed the previous version of subsection (a)(10) of 8 U.S.C. 1105a (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See AEDPA § 401(e), 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); IIRIRA § 304, 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, for aliens placed in removal proceedings after IIRIRA's effective date, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-594. An alien convicted of any aggravated felony is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress directed that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—"shall take effect" on April 1, 1997.

See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625 to 3009-627, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical corrections).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA, 110 Stat. 3009-607. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial-review provisions with the new 8 U.S.C. 1252 (Supp. V 1999), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" various criminal offenses, including aggravated felonies and controlled substance offenses. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting

provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. a. Petitioner Deboris Calcano-Martinez (Calcano) is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1971. Calcano Certified Administrative Record (Calcano C.A.R.) 39-40, 56. On April 24, 1996, Calcano pleaded guilty in New York state court to attempted criminal sale of a controlled substance (heroin) in the third degree. On October 9, 1996, she was sentenced to an indeterminate term of imprisonment of one to three years for that offense. *Id.* at 48-53.

On June 16, 1997, after the general effective date of IIRIRA, the INS commenced removal proceedings against Calcano based on her heroin conviction. Calcano C.A.R. 63-66. The Notice to Appear charged that Calcano had been convicted of an aggravated felony[1] and a controlled substance offense. *Id.* at 65. At Calcano's removal hearing, the immigration judge (IJ) found that her conviction records established her deportabilty on the two grounds that had been charged. The IJ also concluded that Calcano was statutorily

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[1] The definition of "aggravated felony" in the INA includes "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. 1101(a)(43)(B) (1994).

ineligible for any form of relief from removal, and ordered her removed to the Dominican Republic. *Id.* at 30-31; Pet. App. 34a-36a.

Calcano appealed to the Board of Immigration Appeals (BIA), where she argued that she was eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994). The BIA rejected that argument, noting that relief under Section 1182(c) is not available to any alien placed in removal proceedings after the effective date of IIRIRA, which repealed Section 1182(c), and that Calcano is ineligible for cancellation of removal under IIRIRA because of her aggravated felony conviction. The BIA therefore dismissed her appeal. Calcano C.A.R. 3; Pet. App. 37a-39a.

b. Petitioner Sergio Madrid is a native and citizen of Mexico who entered the United States without immigration inspection, and, on December 20, 1989, was granted lawful permanent resident status. Madrid C.A.R. 43-44, 57-58, 71. On September 6, 1994, Madrid was convicted in New York state court of selling a controlled substance (cocaine), and was sentenced to an indeterminate term of between four years and life in prison. *Id.* at 51-54, 56.

On June 24, 1997, after the general effective date of IIRIRA, the INS commenced removal proceedings against Madrid based on his cocaine conviction. Madrid C.A.R. 58, 70-73. The Notice to Appear charged that Madrid had been convicted of an aggravated felony and a controlled substance offense. *Id.* at 72. At his removal hearing before an IJ, Madrid admitted the allegations in the Notice to Appear and conceded his removability as charged. He sought, however, to apply for relief from deportation under former Section 1182(c). *Id.* at 43-45. The IJ ruled that Madrid was

ineligible for that relief, and ordered him removed to Mexico. *Id.* at 29-35; Pet. App. 40a-47a.

The BIA dismissed Madrid's appeal. Madrid C.A.R. 1-2; Pet. App. 48a-49a. In doing so, it concluded that Madrid was not eligible to apply for relief under former Section 1182(c), because he had been placed in removal proceedings after IIRIRA's effective date, when Section 1182(c) was repealed. The BIA also ruled that Madrid was ineligible for cancellation of removal, because of his conviction for an aggravated felony. Madrid C.A.R. 2; Pet. App. 48a-49a.

c. Petitioner Fazila Khan is a native and citizen of Guyana who was admitted to the United States on September 2, 1987, as a lawful permanent resident. Khan C.A.R. 47, 64, 84. On February 13, 1997, after a guilty plea, Khan was convicted in the United States District Court for the Eastern District of New York on one count of unlawful use of a telephone to facilitate the distribution of heroin, in violation of 21 U.S.C. 843(b) and (d) (1994 & Supp. IV 1998). For that offense, she received a sentence of four months' imprisonment, followed by one year of home confinement. Khan C.A.R. 60-62.

On May 13, 1997, after the general effective date of IIRIRA, the INS commenced removal proceedings against Kahn, charging her with removability for having been convicted of an aggravated felony. Khan C.A.R. 6, 84-85. At her removal hearing before an IJ, Kahn admitted the factual allegations against her but denied that her offense of conviction was an aggravated felony. She also sought relief from deportation under former Section 1182(c). *Id.* at 47, 64-65. The IJ ruled that Khan was ineligible for relief under Section 1182(c) and ordered her deported to Guyana. *Id.* at 44-57; Pet. App. 50a-65a.

On appeal to the BIA, Khan renewed her contention that her offense of conviction was not an aggravated felony, and also argued that the IJ erred in finding her ineligible for discretionary relief from deportation. The BIA rejected both arguments and dismissed her appeal. Pet. App. 66a-74a. With respect to the first contention, the BIA ruled that Khan's offense was an aggravated felony under the definition set forth at 8 U.S.C. 1101(a)(43)(B) (1994), which covers "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of title 18)." The BIA noted that 18 U.S.C. 924(c)(2) (1994) in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)"—including Khan's offense under 21 U.S.C. 843(b), which is punishable under the federal Controlled Substances Act by a term of imprisonment of not more than four years (see 21 U.S.C. 843(d) (Supp. IV 1998)). Khan C.A.R. 4; Pet. App. 70a-72a. On the latter point, the BIA upheld the IJ's determination that Khan was ineligible for discretionary relief from removal. Khan C.A.R. 5; Pet. App. 72a-73a.

3. Petitioners each filed a petition for review in the court of appeals, and also filed a petition for a writ of habeas corpus in district court. Petitioners contended that, notwithstanding Congress's repeal of Section 1182(c) of IIRIRA, which became effective before they were placed in removal proceedings, they remained eligible for relief from deportation under Section 1182(c), and that Congress's repeal of that provision should not be applied "retroactively" in their removal proceedings, which involved convictions entered before

IIRIRA became effective.[2] The court of appeals consolidated the petitions for review and held that, because of IIRIRA's preclusion-of-review provision at 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction over the petition for review filed by each petitioner. Pet. App. 28a-31a, 33a. The court also ruled, however, that petitioners could raise the same challenges to their removal orders in district court by petition for a writ of habeas corpus. *Id.* at 21a-28a, 31a-33a. Indeed, the same day, the same panel of the court of appeals ruled in *St. Cyr* v. *INS*, 229 F.3d 406 (2d Cir. 2000), petition for cert. pending, No. 00-767, that the district court had properly exercised habeas corpus jurisdiction under 28 U.S.C. 2241 over just such a challenge (see 229 F.3d at 409-410), and that Congress's repeal of Section 1182(c) was not to be applied to an alien who had pleaded guilty to an aggravated felony offense before IIRIRA was enacted (see *id.* at 410-421).

The court of appeals followed its prior decisions arising under AEDPA and the transitional judicial-review provisions of IIRIRA (see Pet. App. 10a-15a), which had held that the court of appeals was barred under similar preclusion-of-review provisions from considering any claims raised in direct petitions for review filed by aggravated felons (except to the extent that such petitions directly challenged the BIA's conclusion that the alien was removable because of an aggravated felony), but that the district courts retained habeas corpus jurisdiction to consider challenges to a

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[2] Indeed, petitioners argued that the repeal of Section 1182(c) could not be applied to any criminal *conduct* that occurred before IIRIRA was enacted. See Pet. 17. Petitioner Khan did not renew her contention that her offense of conviction was not an aggravated felony.

deportation order that are "purely legal in nature," *id.* at 32a, including "constitutional challenges and claims that the Attorney General misinterpreted the immigration laws," *id.* at 15a. The court of appeals acknowledged that the Fifth and Eleventh Circuits have held that Congress has "eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings." *Id.* at 18a. The court aligned itself (*id.* at 21a-22a), however, with the Third and Ninth Circuits, which have ruled that "Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders," Pet. App. 21a, and that it is therefore unnecessary to read any exceptions into Section 1252(a)(2)(C), which "bars [the courts of appeals'] jurisdiction over petitions to review removal orders against aliens convicted of certain crimes," *ibid.*

In addition, the court read this Court's decisions in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), to hold that "a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name," Pet. App. 22a, and more particularly that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it," *id.* at 23a. The court found "nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." *Ibid.*[3] And, the court stated, the

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[3] In particular, the court rejected (Pet. App. 24a-26a) the government's reliance on Section 1252(b)(9), which expressly requires that judicial review of all legal and factual challenges to a

contrary interpretation would "raise a serious constitutional question under the Suspension Clause," *id.* at 28a, for it would leave petitioners without a judicial forum for their challenge to the BIA's determination that they are ineligible for relief under old Section 1182(c).

The court also rejected the government's argument that, even if the district courts could not review the merits of final removal orders by habeas corpus, the courts of appeals would retain sufficient authority to review final removal orders, on direct petitions for review, to satisfy the Constitution. Pet. App. 28a-30a. The government had submitted that, on petition for review, a court of appeals retains authority to entertain substantial constitutional claims, such as constitutional challenges to the INA itself, as well as challenges going to "jurisdictional facts," such as whether the petitioner "is an alien who is removable by reason of having committed a specified criminal offense," and who therefore falls within the preclusion of review in Section 1252(a)(2)(C). *Id.* at 28a. Even assuming that such review remains available in the court of appeals, the court believed that it would be insufficient to satisfy the

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removal decision be had only in the courts of appeals on petition for review of a final removal order. The court acknowledged that this Court, in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471 (1999) described Section 1252(b)(9) as an " 'unmistakable zipper clause' that channels judicial review of all immigration-related decisions and actions to the court of appeals," Pet. App. 25a (quoting *AADC*, 525 U.S. at 483), but it suggested that Congress enacted Section 1252(b)(9) only for the purpose of "consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals," *id.* at 26a, and not to foreclose any other avenue by which an alien might challenge his removal order, such as a collateral attack in district court by habeas corpus petition.

Constitution, for, the court believed, "review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law." *Id.* at 30a.

Finally, the court observed that, "if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review," for such a scheme "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review." Pet. App. 32a. But, the court stated (*ibid.*), "[a]lthough this interpretation may represent sound legislative policy, * * * we do not read IIRIRA or our prior cases to permit such review under" Section 1252(a)(2)(C).

DISCUSSION

1. Petitioners urge this Court to grant review to decide whether, after the comprehensive changes to the INA made by AEDPA and IIRIRA, a court of appeals on petition for review may entertain challenges to the merits of final removal orders, even one going to the availability of discretionary relief, notwithstanding the broad preclusion of review set forth in 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), and if not, whether the district courts retain authority under 28 U.S.C. 2241 to review such challenges. As petitioners point out, the courts of appeals have reached differing conclusions on those questions.

The Fifth and Eleventh Circuits have ruled that Congress in IIRIRA divested the district courts of authority to entertain a criminal alien's challenge to his final removal order. See *Max-George* v. *Reno*, 205 F.3d 194,

198-203 (5th Cir. 2000), petition for cert. pending, No. 00-6280; *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000). By contrast, in addition to the Second Circuit in the decision below (Pet. App. 21a-33a) and in *St. Cyr* (229 F.3d at 409-410), the First, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 to consider retroactivity challenge), petition for cert. pending, No. 00-962; *Liang* v. *INS*, 206 F.3d 308, 312-323 (3d Cir. 2000), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956, at *2 (9th Cir. Nov. 17, 2000) (same). The Third and Ninth Circuits have also held, in agreement with the court of appeals in this case, that Section 1252(a)(2)(C) broadly precludes the courts of appeals from entertaining challenges to final removal orders raised by criminal aliens on direct petition for review, including challenges similar to that raised by petitioners in this case. See *Liang*, 206 F.3d at 321-323 (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the

INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[4] Petitioners do not dispute that the jurisdictional issue presented in *St. Cyr* warrants review, but they argue (Pet. 20) that the Court should grant review in this case as well as (or instead of) *St. Cyr*, to ensure that the Court has before it a case in which a court of appeals dismissed a petition for review for lack of jurisdiction. Petitioners observe (Pet. 21) that the court of appeals' jurisdictional ruling in *St. Cyr* on the continued availability of habeas corpus relief under 28 U.S.C. 2241 was predicated on its jurisdictional ruling in this case that Congress had expressly foreclosed review in the court of appeals to aliens such as petitioners who were convicted of aggravated felonies.

In our view, the Court would benefit from granting review in both this case and in *St. Cyr*, and consolidating the cases for briefing and argument. Granting review in both cases would ensure that the Court has before it both a case that was filed in the district court and a case that was filed in the court of appeals, and can definitely resolve the question of what court, if any, has jurisdiction to review claims such as these. If the Court were to grant review in only one case, however, that case should be *St. Cyr*, for two reasons. First, the question of district court jurisdiction presented in that case has generated a square conflict in the circuits,

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[4] In addition to the certiorari petitions filed in *St. Cyr*, *Mahadeo*, *Rodriguez*, and *Max-George*, mentioned in the text, related jurisdictional issues are also presented by the certiorari petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, 00-523; and *Russell* v. *Reno*, No. 00-5970.

whereas no court has found jurisdiction in the court of appeals to entertain claims such as those advanced by petitioners here on a direct petition for review. Second, the *St. Cyr* case would likely bring before the Court the question of court of appeals jurisdiction as well as district court jurisdiction, since the Second Circuit concluded that district court habeas corpus jurisdiction must lie precisely *because*, in its view, review in the court of appeals is precluded by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). By contrast, if the Court were to grant review in this case alone and not in *St. Cyr*, it might resolve the issue of the court of appeals' jurisdiction on petition for review without resolving the question of district court habeas corpus jurisdiction presented in *St. Cyr*. In particular, the Court might conclude in this case that the Second Circuit correctly held that court of appeals' review of petitioners' claims was precluded by Section 1252(a)(2)(C), without determining whether the district court had habeas corpus jurisdiction to review the claims, or whether, as the government contends, *neither* court has jurisdiction to consider the specific claims raised by petitioners in this case and the respondents in *St. Cyr*. Thus, the Court might well have to revisit the issue in another case arising from a district court disposition that squarely presented the issue of district court habeas corpus jurisdiction.[5]

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[5] In our response (at 13) to the certiorari petition in *Rodriguez v. INS*, No. 00-753—which, like this case, arises from a court of appeals' (the Third Circuit's) dismissal for lack of jurisdiction of a petition for review filed by an alien who was convicted of an aggravated felony—we observed that it was not necessary for the Court to grant review in that case as well as *St. Cyr* because the Court could effectively resolve all the jurisdictional issues in *St. Cyr* and would have before it in that case the rationale of the Second Circuit's decision in this case. For the reasons stated in the

2. In addition, the Court should grant review in *St. Cyr* (as well as this case) because the Second Circuit's ruling on the merits in that case independently warrants review. As we explain in our certiorari petition (at 27-28) in *St. Cyr*, the court of appeals erroneously ruled in that case that an alien who was convicted on a guilty plea of an aggravated felony before AEDPA and IIRIRA were enacted, but was placed in removal proceedings after IIRIRA's effective date, remains eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), even though that provision was repealed by IIRIRA. We also explain in our petition (at 28-29) in *St. Cyr* that the Second Circuit's decision on that point conflicts with the decisions of the Seventh and Eleventh Circuits.[6]

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text, however, we now believe, on further consideration, that the Court should grant review both in *St. Cyr* and in a case in which a court of appeals has dismissed a petition for review. If the Court agrees, this case presents a better vehicle than *Rodriguez* for considering a petition for direct review. The Second Circuit, unlike the Third Circuit, has definitively ruled on the jurisdictional issues in *both* a habeas corpus and a petition-for-review case, and the Second Circuit, unlike the Third Circuit, has also definitively resolved the question of the continued availability of relief under former Section 1182(c) for aliens convicted before IIRIRA was enacted but placed in removal proceedings under IIRIRA.

[6] Since we filed our certiorari petition in *St. Cyr*, the Ninth Circuit has also issued a ruling that is inconsistent with the Second Circuit's decision. In *Richards-Diaz, supra*, the Ninth Circuit held that Congress's repeal of Section 1182(c) generally applies to all aliens placed in removal proceedings after the effective date of IIRIRA, regardless of their date of conviction. See 2000 WL 1715956, at *3-*4. The Ninth Circuit also stated, in so ruling, that it found Judge Walker's dissent to the Second Circuit's decision on the merits in *St. Cyr* to be "compelling." *Id.* at *3. The Ninth Circuit also held, however, that "a limited exception to this general rule" is available for an alien who can specifically show that he

The same "retroactivity" claim has been raised by dozens of aliens in both petitions for review and habeas corpus petitions in the lower federal courts and potentially affects the cases of thousands of other aliens who were convicted of aggravated felonies before AEDPA and IIRIRA were enacted. Because that important issue on the merits was reached by the Second Circuit in *St. Cyr* and not in this case, *St. Cyr* most squarely presents that important and widely recurring issue. Accordingly, if the Court concludes that district courts do have habeas corpus jurisdiction to entertain petitioners' claim that the Attorney General may grant them relief under Section 1182(c) notwithstanding Congress's repeal of that provision, the Court could then most readily render a prompt and definitive resolution of that issue on the merits in *St. Cyr*. And a prompt and definitive judicial resolution of that issue is plainly warranted—if, contrary to our submission, it is subject to judicial review at all—in order to terminate the widespread litigation on the issue in the lower courts and to accomplish the expeditious removal of criminal aliens that Congress so clearly intended when it enacted AEDPA and IIRIRA.[7]

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pleaded guilty before the effective date of IIRIRA in reliance on the state of the law at the time, under which he would have been eligible for discretionary relief from deportation. *Id.* at *4. By contrast, the Second Circuit ruled broadly in *St. Cyr* that Congress's repeal of Section 1182(c) cannot be applied to *any* alien who pleaded guilty to a pertinent offense before the enactment of IIRIRA, and the Second Circuit has not required a showing that the alien specifically relied on the state of the law at the time when pleading guilty. See 229 F.3d at 418.

[7] The government's position, as petitioners note (Pet. 5-6), is that neither the court of appeals nor the district court has juris-

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be consolidated for briefing and oral argument with *INS* v. *St. Cyr*, No. 00-767.

Respectfully submitted.

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DECEMBER 2000

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diction to review that challenge, and that the "retroactivity" claim in any event is without merit.

Supreme Court, U.S.
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No. 00-1011

IN THE

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The government's response to the petition for certiorari suggests that the Court should grant the petitions in both this case and in *St. Cyr* and that the two cases should be consolidated for briefing and argument. Alternatively, the government argues that if the Court decides to take only one case, then the petition in *St. Cyr* should be granted.

As set forth in the petition for certiorari, our position is that this case, not *St. Cyr,* provides the better vehicle for review of the jurisdictional issue. Accordingly, if the Court decides to grant certiorari on that issue, petitioners respectfully urge the Court to grant the instant petition and hold the petition in *St. Cyr*. Alternatively, as the government suggests, we agree that the Court could grant the petitions in *both* cases. However, petitioners strongly disagree with the government's suggestion that the cases be consolidated for briefing and argument. Instead, if review is granted in both cases on the jurisdictional issue, petitioners respectfully submit that there should be separate briefing on that issue, and, if review is granted on the merits issue as well, the two cases should be briefed separately and argued separately in tandem.

Because petitioners' position is set forth fully in the petition for certiorari, we make only the following points in response to the government's Brief for the Respondent ("Resp. Br.").

1. As a preliminary matter, petitioners note that the government errs in stating that we are independently urging the Court to grant certiorari to review the Second Circuit's interpretation of IIRIRA's jurisdictional amendments. Resp. Br. at 15-16. As we state in our petition, our contention is that *some* avenue of review must remain available for petitioners to raise their constitutional and statutory claims. Because the Second Circuit preserved

district court habeas jurisdiction over petitioners' claims, we do not object to the dismissal of the petitions for review, and thus, urge the Court to grant review of the Second Circuit's ruling in this case only if the Court decides to grant certiorari on the jurisdictional issues raised by this case and *St. Cyr.* Pets. Br. at 2-3, 7-8, 19-25.

2. If the Court decides that review of the jurisdictional issue is warranted, petitioners submit that this case is a better vehicle than *St. Cyr*. The instant case, by itself, would provide the Court with a complete vehicle to decide the entire jurisdictional issue, and therefore (contrary to the government's position) there is no need to grant certiorari in both this case and *St. Cyr* to resolve that issue.

Other than urging review of the merits (Resp. Br. at 20-22), which has no bearing on which case is the better vehicle for deciding the jurisdictional issue, the government offers two reasons for granting review in *St. Cyr* either in addition to or instead of this case. First, the government contends that the Court should take both cases because the availability of habeas corpus and petition-for-review jurisdiction are intertwined and should be considered together. Thus, the government asserts that the Court should grant review in both cases to "ensure that the Court has before it both a case that was filed in the district court and a case that was filed in the court of appeals. . . ." Resp. Br. at 18.

Petitioners agree that the availability of habeas corpus and petition-for-review jurisdiction are necessarily intertwined, as we fully set forth in the petition. Pet. Br. at 19-25. But, as we further explained in the petition, this case by itself provides a complete vehicle because the petitioners here *did* file both petitions for review in the court of appeals and habeas corpus petitions in the district court. Hence, the court of appeals exhaustively

addressed both avenues of jurisdiction in its opinion in this case and squarely held that petitioners could proceed in district court with their already-filed habeas corpus actions. And, as the circuit decision notes, Pet. App. 28a-32a, the government argued its full jurisdictional position in this case, namely that IIRIRA had repealed the district courts' habeas corpus jurisdiction, that the court of appeals lacked jurisdiction over petitioners' claims, and that judicial review of those claims was wholly precluded.

The government states that if the Court grants certiorari in this case alone, then the Court might choose to address only the petition-for-review aspect of the case and leave the availability of habeas corpus for another case. Resp. Br. at 19. Yet, significantly, given the fact that the petitioners in this case sought review in both the district court and the court of appeals, and the fact that the court of appeals' decision addresses both avenues of jurisdiction, the government does not suggest that the Court would be *unable* to reach both avenues of jurisdiction were it to take only this case. Indeed, the manner in which the government itself framed the question presented in this case makes clear that this case directly implicates *both* avenues of jurisdiction. *See* Question Presented in Brief for the Respondent (stating that question presented is "[w]hether the court of appeals correctly concluded that . . . it lacked jurisdiction on direct petitions for review over petitioners' challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241"). Thus, the government has offered no reason that a grant in *St. Cyr* is necessary to present the Court with the full jurisdictional issue.

3. Second, the government contends that if the Court is going to take only one case, *St. Cyr* is the better vehicle. The government makes that contention on the ground

that, in its view, the only circuit split concerns the availability of district court habeas jurisdiction because no circuit has thus far affirmatively exercised petition-for-review jurisdiction over the types of claims raised in this case and *St. Cyr*. Resp. Br. at 18-19. But that argument is contrary to the entire thrust of the government's petition in *St. Cyr*, which notes that the courts of appeals have treated the availability of petition-for-review jurisdiction as inextricably intertwined with the availability of habeas corpus jurisdiction. The Second Circuit found that habeas corpus remains available because the circuit's own petition-for-review jurisdiction was repealed by Section 1252(a)(2)(C). *See, e.g.*, Pet. App. 21a-22a, 28a-32a (opinion below). *See also Liang v. INS*, 206 F.3d 308, 312 (3d Cir. 2000), *petition for certiorari pending sub nom. Rodriguez v. INS*, No. 00-753 ("determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction"); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1136 (9th Cir. 2000) (stating that availability of habeas jurisdiction means that court "need not read any limitations into the provision that bars our jurisdiction over petitions to review removal orders against aliens convicted of certain crimes").

Given the necessary interconnection between habeas corpus and petition-for-review jurisdiction that the government itself stresses, it is artificial to contend that there is only a division among the circuits regarding the availability of habeas jurisdiction and to suggest that the disagreement regarding habeas review can be divorced from the issue of whether the courts of appeals continue to possess petition-for-review jurisdiction over the types of claims raised in this case and *St. Cyr*. The government has thus offered no reason why *St. Cyr* alone is a preferable vehicle for deciding the jurisdictional issue.

In light of the foregoing, petitioners submit that it is neither necessary nor preferable to grant review in both cases (or *St. Cyr* alone). There are, however, reasons *not* to grant in both cases. Petitioners submit that granting in this case alone is simpler and avoids potentially presenting the Court with ancillary issues that should be resolved by the court of appeals in the first instance. As set forth in the petition, *St. Cyr* potentially raises subordinate issues that would arise if this Court were now to conclude that the claims presented in this case and *St. Cyr* must be presented in a petition for review and cannot be raised in a habeas corpus action. Pets. Br. at 20 n.8, 23. Those issues, of importance in the *St. Cyr* context, would vary from circuit to circuit and would needlessly complicate the briefing at this stage. *See id.*

4. If the Court were, however, to grant the petitions in both this case and *St. Cyr*, petitioners oppose the government's suggestion that the two cases should be consolidated for briefing and argument. The government offers no reasons for such consolidation, and petitioners submit that numerous grounds dictate separate briefing. First, the cases were not consolidated in the Second Circuit. The cases were argued separately (in tandem) and, significantly, decided in separate opinions by the Second Circuit (with the court of appeals issuing its merits ruling in *St. Cyr* and its jurisdictional ruling in this case). Although there is overlapping counsel in the two cases, the aliens in each case also have separate individual counsel.

Second, because the cases arise in different postures, with the government petitioning in *St. Cyr* and the immigrants petitioning in this case, the sequence of the briefing in the two cases is different. If the cases were consolidated for briefing, then either the government or the aliens would be deprived of the opportunity to file

the opening and the reply brief, as each is entitled to do as the petitioner in the respective cases.

Third, this case and *St. Cyr* are in different postures because the petitioners here filed both petitions for review and habeas corpus actions whereas the alien in *St. Cyr* filed only a habeas corpus action. *St. Cyr*, therefore, raises ancillary issues that, as indicated above, are not present in this case. *See also* Pets. Br. at 20 n.8, 23.

Fourth, the central jurisdictional issue raised by this case involves questions of considerable complexity and importance, namely whether any court has jurisdiction to review petitioners' claims, and if not, whether IIRIRA's amendments violate the Constitution. If the Court were to determine that the merits retroactivity issue decided in *St. Cyr* also warrants review, then that would constitute a distinct reason for the cases to be separately briefed and argued. The merits issue was decided only in *St. Cyr* and is a separate question that is appropriate for full briefing and argument. Petitioners agree that the merits issue cannot be briefed in this case. However, if the merits were to be briefed in *St. Cyr*, then that case would not permit sufficient briefing on jurisdiction as well. Accordingly, if the Court grants review of both the jurisdiction and merits issues, petitioners respectfully submit that the principal jurisdictional issue should be briefed and argued in this case and the merits issues should be briefed and argued in *St. Cyr*.

For the foregoing reasons, petitioners respectfully submit (1) that this case is the better vehicle for addressing the jurisdictional issue, (2) that granting review in *St. Cyr* does not add to the presentation of the jurisdictional issue and may well present unnecessary ancillary questions, (3) that if the Court grants review of the jurisdictional issue in both cases, then the cases should be briefed separately, and (4) that if the Court were also to

grant review of the merits question in *St. Cyr*, then the jurisdictional issue should be briefed and argued in this case and the merits issue briefed and argued in *St. Cyr*.

Respectfully submitted,

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In The

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C), it lacked jurisdiction on direct petition for review over petitioners' statutory and constitutional challenges to their final removal orders, but that the district courts had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

2. Whether IIRIRA's amendments to the Immigration and Nationality Act violate the Suspension of Habeas Corpus Clause, Article III, or the Due Process Clause of the Fifth Amendment if they preclude all review of petitioners' constitutional or statutory claims.

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OPINIONS BELOW

The court of appeals opinion, 232 F.3d 328 (2d Cir. 2000), is reproduced at Pet. App. 1a. The related court of appeals opinion in *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), is reproduced in the appendix to the petition in No. 00-767. The rulings of the immigration judges and Board of Immigration Appeals for the three petitioners are reproduced at Pet. App. 34a and Pet. App. 37a for Calcano-Martinez; at Pet. App. 40a, Pet. App. 43a and Pet. App. 48a for Madrid; and at Pet. App. 50a and Pet. App. 66a for Khan.

JURISDICTION

The court of appeals entered its judgment on September 1, 2000. On November 21, 2000, Justice Ginsburg extended the time within which to file a petition for writ of certiorari until December 30, 2000. The petition for writ of certiorari was filed on December 21, 2000, and granted on January 12, 2001. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in an appendix to this brief. App. 1a-3a. Portions of the Suspension of Habeas Corpus Clause of the Constitution, U.S. Const. Art. I, § 9, cl. 2; the Due Process Clause of the Fifth Amendment; and Article III of the United States Constitution are set forth at Pet. App. 75a.

STATEMENT

The issue in this case is whether a ruling by the Board of Immigration Appeals (BIA) on a pure question

of law compelling the deportation of longtime legal permanent residents can be completely insulated from any judicial scrutiny. The government asserts that no court has jurisdiction to determine whether these administrative orders rest on an impermissible construction of the Immigration Act. The government's position is that the judiciary is entirely foreclosed from considering petitioners' claims and, further, that such complete preclusion presents no constitutional concerns.

The court of appeals rejected the government's contentions. While concluding that its own jurisdiction under the Immigration Act to review petitioners' claims through a petition for review had been repealed, the Second Circuit ruled that the district courts retained their historic jurisdiction under the federal habeas corpus statute, 28 U.S.C. 2241, to address the validity of petitioners' removal orders. In a companion case, *INS v. St. Cyr*, No. 00-767, the Second Circuit relied on its jurisdictional decision in this case, upheld the district court's exercise of habeas jurisdiction, and held on the merits that the BIA had erred on a statutory retroactivity question like the one raised by petitioners here. The government has asked this Court to reverse that decision on the merits, but its principal position is that both the district court and the court of appeals lack jurisdiction over the type of statutory retroactivity claims presented in *St. Cyr* and this case.

To be sure, the question of whether petitioners' claims are properly reviewed in the district court or the court of appeals is an important one. But it is also a secondary question for two reasons. First, petitioners would be satisfied with review in either court. Second, the government's view is that neither court may properly exercise jurisdiction over petitioners' claims. Thus, the fundamental question that this Court must resolve is

whether *any* court has jurisdiction to hear the pure questions of law that petitioners assert.

A. Legal Background.

In 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (Sept. 30, 1996). IIRIRA created new provisions governing judicial review of immigration orders, which are set forth at 8 U.S.C. 1252. Like the prior statute, Section 1252 vests the courts of appeals with jurisdiction to review final orders of "removal" (a new term that embraces what were formerly described as deportation and exclusion orders). Unlike the pre-existing statute however, Section 1252 also contains a preclusion provision, entitled "Matters not subject to judicial review." 8 U.S.C. 1252(a)(2). Subsection (C) of that preclusion provision states in relevant part that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against any alien who is removable by reason of" certain designated criminal offenses.

The preclusion statute has given rise to two principal jurisdictional questions regarding aliens who, like petitioners, are deportable on the basis of designated criminal offenses. The first goes to the *scope* of review. Did Congress (and can Congress) preclude the courts from reviewing the type of pure question of law at issue here? The second goes to the proper *forum* for such aliens to seek judicial scrutiny of their final removal orders. Is that forum in the court of appeals (through a petition for review) or a district court (through a habeas corpus action, 28 U.S.C. 2241)? Most circuits, including the Second Circuit, have held that the proper *forum* for petitioners' claims is a habeas corpus action in district court under 28 U.S.C. 2241 and that the scope encompasses the

type of statutory claims petitioners present.[1] A few circuits have concluded that all review must be sought in the court of appeals by a petition for review, but have not decided whether the *scope* of review would insulate petitioners' claims from all judicial scrutiny.[2]

In earlier litigation under similar preclusion statutes enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and IIRIRA's "transitional" rules, ten of eleven circuits to consider these questions held that a Section 2241 habeas action in district court was the proper forum, and that the scope encompassed the type of statutory retroactivity claim raised by petitioners here.[3] The one circuit that placed review in the court of appeals suggested that the scope of review encompasses petitioners' claims: "It seems unlikely that Congress would have wanted the Board to

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[1] Pet. App. 1a (opinion below); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), *petition for cert. filed sub nom. Rodriguez v. INS*, No. 00-753; *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000), *petition for cert. filed*, No. 00-962; *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000).

[2] *See Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000) (leaving scope unresolved), *petition for cert. filed*, No. 00-6280; *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (same), *cert. denied*, 529 U.S. 1036 (2000).

[3] *See Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999).

have the final word on so pure and fundamental a question of law as when the statute went into effect." *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998) (Posner, C.J.), *cert. denied*, 528 U.S. 1153 (2000).

B. Petitioners' Merits Claims.

The underlying merits issue in this case – although not presented in the present case, *see INS v. St. Cyr*, No. 00-767 – is one of statutory retroactivity under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Under the Immigration and Nationality Act (INA), a wide range of criminal convictions are grounds for deportation. *See* 8 U.S.C. 1227(a)(2) (listing criminal offenses). These apply to any alien, regardless of legal status, length of residence in the United States, service in the military, or familial relationships to American citizens.

For decades, the INA has provided for a discretionary waiver of deportation to allow amelioration of the rigid application of the deportability provisions in the case of legal permanent residents who commit deportable criminal offenses. At the time of petitioners' offenses, that waiver was codified at former 8 U.S.C. 1182(c). The eligibility criteria were set by statute and limited the waiver to legal permanent residents who had maintained an uninterrupted lawful domicile in the United States for seven years. Statistics from the Justice Department show that the waiver has historically been granted in approximately half of the cases. *See Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

Petitioners met the statutory eligibility criteria of Section 1182(c) at the time of their crimes or convictions. However, IIRIRA created new bars to relief under the functionally equivalent relief provision of IIRIRA, which is called "cancellation of removal." 8 U.S.C. 1229b. If the new bars to relief apply to petitioners, they are prohibited

from seeking discretionary relief despite their family ties in this country and their long-term status as permanent residents. The government maintains that no court has jurisdiction to decide whether Congress expressed the clear intent necessary to apply the new bars to relief retroactively, i.e., to events before their enactment. *See Landgraf*, 511 U.S. at 280.[4]

C. Factual Background.

Petitioners concede that their offenses render them deportable, but each has sought to apply for a waiver of deportation under former Section 1182(c). In all three cases, the BIA ruled that Section 1182(c) had been repealed by IIRIRA as of April 1, 1997, and that the repeal applied to all cases in which administrative immigration proceedings had commenced on or after that date. The Board rejected petitioners' contention that the repeal should not apply retroactively to cases, like theirs, where the event triggering deportation occurred prior to passage of IIRIRA and AEDPA. Because the BIA denied Section 1182(c) relief as a matter of law, the Board never purported to exercise its discretion. Instead, it issued final orders of removal on the ground that petitioners had committed deportable offenses and were statutorily ineligible to seek any relief from deportation.

Petitioner Deboris Calcano-Martinez was admitted as a lawful permanent resident in 1971 at the age of three. Pet. App. 5a. She has four children who are United States

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[4] Prior to IIRIRA, AEDPA amended Section 1182(c) and expanded the list of disqualifying criminal offenses. Petitioners' contention on the merits is that neither AEDPA's nor IIRIRA's provisions apply retroactively to conduct that occurred before enactment of both laws. The Second Circuit's merits ruling in No. 00-767 addresses both AEDPA and IIRIRA.

citizens. *Id.* In April 1996, she pled guilty in a New York State court to the offense of attempted criminal sale of a controlled substance in the third degree and received an indeterminate sentence of one to three years. Pet. App. 5a-6a. The INS instituted removal proceedings in June 1997 on the ground that her criminal conviction rendered her deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony), and 1227(a)(2)(B)(i) (controlled substance offense). Pet. App. 35a. The BIA refused to consider her application for Section 1182(c) relief and issued a final order of removal.

Petitioner Sergio Madrid became a lawful permanent resident in 1989 at the age of seventeen. Pet. App. 7a. In September 1994, he was convicted in a New York State court of the offense of criminal sale of a controlled substance in the second degree. He received an indeterminate sentence of four years to life imprisonment but was released after approximately four years. Pet. App. 7a. The INS instituted removal proceedings in June 1997 under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony) and 1227(a)(2)(B)(i) (controlled substance offense). Pet. App. 45a. The BIA refused to consider his application for Section 1182(c) relief and issued a final order of removal.

Petitioner Fazila Khan was admitted to the United States as a lawful permanent resident in 1987. Pet. App. 7a-8a. Her four-year-old daughter, mother, sister, and five of her aunts and uncles are all United States citizens. Pet. App. 8a. In 1996, petitioner pled guilty to a controlled substance offense committed in March 1996, for which she received a four-month sentence followed by a one-year period of supervised release. Pet. App. 8a, 59a. The INS initiated removal proceedings against Khan in May 1997 on the ground that she was deportable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 8a.

The BIA refused to consider her application for Section 1182(c) relief and issued a final order of removal.

D. Proceedings Below.

Petitioners all filed petitions for review in the court of appeals seeking review of their final orders of removal on two grounds. Petitioners' principal claim is that IIRIRA's change in eligibility criteria does not apply retroactively to events that occurred before passage of the 1996 amendments. Petitioners also contend that if the new bar to relief does apply to them, it would violate due process and equal protection. Because of the jurisdictional uncertainty engendered by IIRIRA, petitioners also filed district court habeas actions raising the same statutory and constitutional claims. The district courts have declined to adjudicate those actions pending a final disposition of the instant petitions for review. Pet. App. 6a-8a.

In the Second Circuit, the government argued that the district courts' traditional habeas corpus jurisdiction had been repealed and that the court of appeals' jurisdiction by petition for review is limited to two types of inquiries. The government contended, first, that aliens could file petitions for review to challenge whether they fall within the language of Section 1252(a)(2)(C), and thus, could challenge the BIA's finding that they are (i) aliens, (ii) who are removable, (iii) on the basis of a listed offense.[5] The government also contended that aliens who are removable on the basis of a listed offense could raise "substantial constitutional" challenges to their removal order, even though the preclusion language of Section

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[5] The court of appeals, in an earlier opinion, agreed with that position. *See Bell v. Reno*, 218 F.3d 86, 89 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 784 (2001).

1252(a)(2)(C) does not differentiate between constitutional and nonconstitutional claims. As to petitioners' specific claims, the government asserted that petitioners could not raise their statutory retroactivity claim in any court, and that petitioners' constitutional claims were not substantial and were therefore unreviewable.

The court of appeals rejected the government's contention that the pure questions of law raised by petitioners were unreviewable in any court. The court of appeals first held that, under circuit precedent (interpreting the analogous preclusion statutes in AEDPA and IIRIRA's transitional rules) the new preclusion provision, Section 1252(a)(2)(C), repealed its own petition-for-review jurisdiction over the statutory and constitutional claims raised by petitioners. Pet. App. 28a-30a. The court of appeals then exhaustively analyzed each of the provisions of IIRIRA and held that none repealed the district courts' habeas jurisdiction under 28 U.S.C. 2241 to hear petitioners' claims. Pet. App. 21a-28a. Accordingly, the court of appeals dismissed the petitions for review for lack of jurisdiction without reaching the merits and held that petitioners could pursue their constitutional and statutory claims in their previously-filed district court habeas corpus actions.

The court of appeals also rejected the suggestion that review of only substantial constitutional claims was sufficient. The Second Circuit referred to its analysis in *Henderson v. INS*, 157 F.3d 106, 112-22 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999), in which the court had thoroughly reviewed the history of habeas corpus scrutiny of deportation orders. Pet. App. 30a. The opinion below reiterated the Second Circuit's earlier conclusion that "novel and profound constitutional questions" would arise if no judicial forum were available to raise pure

questions of constitutional or statutory law. Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted a new judicial review statute to govern judicial review of final orders of removal. As under prior law, IIRIRA generally provides that final orders of removal are reviewable in the court of appeals by a petition for review. IIRIRA also enacted a preclusion provision (8 U.S.C. 1252(a)(2)(C)) that prohibits judicial review of final orders in the case of aliens, like petitioners, who are deportable based on certain criminal offenses. Section 1252(a)(2)(C) prohibits broad APA-type judicial review, but it does not eliminate the level of judicial scrutiny historically provided over deportation orders by habeas corpus. Nor could the statute survive constitutional scrutiny if it prohibited the minimum level of review historically afforded in habeas corpus for aliens facing deportation.

During a long period of American history, from 1891 until the 1950s, deportation and exclusion orders issued by administrative immigration officers were "final" under the immigration statutes and were held by this Court to be immune from "judicial review." Nonetheless, throughout this period, this Court – in dozens of cases – held that aliens were entitled to challenge their orders in habeas corpus. Although the scope of habeas inquiry is narrower than judicial review under the APA, this Court (as well as the lower courts) made clear that habeas corpus encompassed review of the *legality* of the deportation order. Accordingly, this Court consistently adjudicated claims of statutory construction to ensure that immigration officials acted within the bounds of the law

and did not transgress the authority conferred upon them by statute.

In *Heikkila v. Barber*, 345 U.S. 229, 236 (1953), the Court reviewed this era and held that "judicial review" was distinct from habeas corpus and that "it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act." *Heikkila* further emphasized that until the APA became applicable to review of deportation orders, the immigration statutes had "preclud[ed] judicial intervention except insofar as required by the Constitution." *Id.* at 234. Yet, throughout that earlier period this Court reviewed constitutional *and* statutory claims, making clear that the minimum level of habeas review exercised during this period cannot be abrogated. Like the preclusion provisions in those earlier laws, Section 1252(a)(2)(C) can and should be construed to permit review of the pure questions of law raised here.

Indeed, the government's view of the statute would render it plainly unconstitutional. The core of the Great Writ, protected by the Suspension Clause, ensures that there will not be *executive detention* without judicial process. In addition, the prohibition of all review would raise distinct constitutional problems under the Due Process Clause and Article III.

Two avenues are available for preserving the scope of review required by habeas corpus and avoiding the profound constitutional questions that would be presented if petitioners' claims were barred. One alternative, adopted by the court of appeals, is to preserve habeas corpus under the federal habeas corpus statute, 28 U.S.C. 2241. As numerous lower courts have held, none of the provisions enacted by Congress contain the express directive necessary to repeal Section 2241. Alternatively, the Court could construe the preclusion provision to preserve direct

review in the court of appeals by a petition for review over those claims historically cognizable in habeas corpus. Such an alternative to Section 2241 is constitutionally permissible, *provided* that the scope of review in the court of appeals is commensurate with the level of review that would be available under Section 2241. Either construction of the statute avoids the far-reaching constitutional questions that would be triggered by a statute that repealed all jurisdiction in any court over petitioners' claims.

ARGUMENT

I. THE HISTORY OF IMMIGRATION LAW IN THIS COUNTRY SHOWS THAT IIRIRA DOES NOT AND CONSTITUTIONALLY COULD NOT DEPRIVE ALIENS OF A JUDICIAL FORUM TO ASSERT THEIR STATUTORY AND CONSTITUTIONAL CLAIMS.

The Board of Immigration Appeals held that petitioners are subject to mandatory deportation, without any opportunity to apply for a waiver, based on its construction of the temporal scope of recent amendments to the Immigration Act. The Board's generally-applicable legal ruling must be subject to review in some court, at some point. At a minimum, there must be habeas corpus (or its equivalent) to review the Board's legal ruling. There is no authority and no tradition that sanctions deportation based solely on an administrative agency's construction of a law. Nor is there anything in IIRIRA that compels the Court to reach the profound constitutional questions that would be raised if a statute – for the first time in the Nation's history – were to vest unreviewable authority in an administrative agency over pure questions of law where an individual's liberty is at stake. The preclusion

statute can and should be construed to avoid the "novel and profound constitutional questions" that would be presented if IIRIRA were to prohibit all judicial scrutiny, including by habeas corpus, of petitioners' claims. *See* Pet. App. 21a-22a (citing *Felker v. Turpin*, 518 U.S. 651 (1996)); *see also Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999) (finding potentially serious constitutional questions if habeas review of same type of claims were barred); *see generally DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A. Overview: Evolution Of Judicial Review In The Immigration Context.

1. Pre-1996 judicial review scheme.

The 1996 amendments are the latest in a long line of amendments to the judicial review statutes governing immigration. Historically, deportation orders were reviewable in the district court, principally by habeas corpus, and for a brief period by declaratory judgment actions under the Administrative Procedure Act. *See Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) (discussing history of habeas corpus review of immigration decisions); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (noting that 1952 Immigration and Nationality Act made APA applicable to deportation decisions, thereby permitting declaratory actions).

In 1961, Congress created the modern judicial review scheme, which governed until the enactment of IIRIRA in 1996. *See* Act of Sept. 26, 1961, § 5, 75 Stat. 651 (formerly codified at 8 U.S.C. 1105a) (setting forth basic review scheme under 1961 statute) (repealed by IIRIRA § 306(b)). The 1961 amendments gave the courts of appeals principal responsibility for reviewing deportation orders by means of a "petition for review." The scope of review in a petition for review was broad and provided the full range

of judicial review afforded under the Administrative Procedure Act, including review of questions of law, abuse of discretion, and the agency's factual findings. *Id.*

Two basic points emerge from the history of these pre-1996 judicial review provisions. The first is that the forum and mode of review have changed over time, from district court actions under pre-1961 law to petitions for review in the courts of appeals after 1961. The more critical point, discussed in detail below, is that there has always been a floor below which the *scope* of review has never fallen. That minimal scope of inquiry has been the level of judicial scrutiny afforded by habeas corpus. In the absence of broader APA-type review, habeas corpus has always been available as a safeguard for an alien facing deportation from the country.

The scope of inquiry in a habeas corpus action has historically been narrow and has not provided broad review of an immigration official's factual or discretionary determinations. But it has always guaranteed resident aliens the opportunity to challenge the *lawfulness* of their deportation orders, and thus, the right to obtain a ruling from an independent judicial tribunal as to whether an immigration officer's actions were based on a proper construction of the governing statutes.

Equally important, this minimal level of habeas review has been preserved by this Court in the face of recurrent attempts by Congress to render administrative immigration decisions "final" and beyond the power of courts to review. This history was summarized by the Court at length in *Heikkila*, 345 U.S. at 235-36. *Heikkila* emphasized that although the restrictive judicial review schemes enacted by Congress at the turn of the twentieth century, and for sixty years thereafter, were clearly intended to eliminate the courts from the deportation

process, the Court never interpreted the schemes as eliminating habeas scrutiny as a safeguard against unlawful deportation orders. The 1996 amendments to the INA were enacted against this backdrop, in which review has expanded at times beyond habeas corpus to include full APA-type judicial review, but has *never* fallen below the minimum level of habeas scrutiny.

2. 1996 amendments.

In 1996, Congress enacted three sets of jurisdictional amendments: those made by (i) AEDPA, which amended the 1961 Act, (ii) IIRIRA's *transitional* rules, which further amended the 1961 Act, and (iii) IIRIRA's *permanent* rules, which repealed and wholly replaced the provisions of the 1961 Act. The permanent IIRIRA rules directly govern this case because petitioners were placed into administrative removal proceedings after April 1, 1997.[6]

Under all three sets of 1996 amendments, the courts of appeals remain the principal forum for review of final deportation orders, as they were under the 1961 Act. *See generally Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). The three sets of amendments also contain preclusion provisions that curtail review for aliens with certain criminal convictions. *See* AEDPA

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[6] Administrative cases initiated before April 1997 are governed by the 1961 Act as amended by either AEDPA or IIRIRA's transitional rules. AEDPA's amendments govern cases in which the alien was placed into immigration proceedings before April 1, 1997, and the deportation order became administratively final prior to October 31, 1996. *See Henderson*, 157 F.3d at 117. IIRIRA's transitional rules are applicable to cases in which the deportation order became administratively final on or after October 31, 1996. IIRIRA § 309(a). The transitional rules are set forth in IIRIRA § 309(c)(4), but are not codified in the U.S. Code.

§ 440(a); IIRIRA § 309(c)(4)(G) (transitional provision); 8 U.S.C. 1252(a)(2)(C) (permanent rule). In this respect, the 1996 amendments are unlike the 1961 Act (which contained no preclusion provisions), and are instead like the older immigration preclusion statutes discussed by the Court in *Heikkila*.

The 1996 preclusion provisions, including the permanent IIRIRA provision at issue here, unquestionably eliminate broad judicial review for aliens, like petitioners, who are removable on the basis of a listed criminal offense. The question posed by this case is whether the statute also eliminates even the minimal level of judicial scrutiny historically guaranteed by habeas corpus.

The secondary question posed by this case is whether the *forum* and *mode of procedure* that are available to petitioners to obtain review of their claims should be a habeas corpus action as such (under 28 U.S.C. 2241), or instead, some other mechanism for obtaining a commensurate level of review. As the Court has established, the Constitution protects the *scope* of the writ rather than its form. *See generally Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention" does not violate the Suspension Clause). Accordingly, a traditional habeas action under Section 2241 need not be available if IIRIRA is construed to preserve petitioners' right to obtain review of their legal claims by a petition for review in the court of appeals. The proper forum and mechanism for review are not, therefore, of constitutional dimension in this case. But if both the petition for review and the Section 2241 procedure are barred, then IIRIRA has denied a level of review that is required by the Constitution. Petitioners' central submission, therefore, is that IIRIRA does not, and constitutionally could not, reduce review below even the

minimal level of judicial scrutiny traditionally afforded in habeas corpus actions.

B. As A Matter Of Statutory Construction, Section 1252(a)(2)(C) Does Not Preclude Habeas Corpus Scrutiny To Test The Legality Of The Deportation Order.

The preclusion statute at issue here is Section 1252(a)(2)(C) which, by its terms, restricts "judicial review" but nowhere mentions habeas corpus (or 28 U.S.C. 2241). It thus precludes "judicial review" under the APA (or other statutes), but it does not abrogate habeas corpus and should not be read to do so. That is particularly the case given the enormous constitutional questions that would be triggered by the repeal of even the minimum level of judicial scrutiny historically guaranteed by habeas corpus.

The Court has made clear that in the absence of any other means of commensurate review, habeas corpus will not be repealed by implication. For a statute to repeal habeas corpus, it must be express. That longstanding, constitutionally-driven principle was reiterated by the Court in *Felker v. Turpin*, 518 U.S. 651 (1996), just months before IIRIRA's passage. *See also Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). Thus, in *Felker*, the Court held that although a bar on this Court's jurisdiction over successive habeas petitions filed by criminal defendants was broadly preclusive, it was insufficiently specific to repeal the Court's original habeas jurisdiction under Section 2241, noting that the preclusion statute nowhere "mentions" the Court's authority to entertain habeas petitions under that specific provision. *Felker*, 518 U.S. at 661-62; *Yerger*, 75 U.S. at 105 ("Repeals by implication are not favored"). This clear statement rule serves the critical function of compelling Congress to act explicitly when it legislates in

an area with grave consequences for individual litigants and with serious implications for the historic structural role played by the courts in overseeing administrative deprivations of liberty. Accordingly, under *Felker*, IIRIRA's general prohibition of "judicial review" does not repeal habeas corpus, because it nowhere mentions it.

The principle of preserving habeas corpus scrutiny has found specific application in the immigration context, where the Court has always preserved habeas corpus in the face of broad preclusion statutes. For over sixty years, immigration legislation contained statutory prohibitions designed to preclude judicial scrutiny of deportation orders. The Court consistently read those statutes as prohibiting the courts from reviewing immigration orders, yet never construed the statutes to limit the scope of review provided by habeas corpus.

1. Immigration statutes that preclude judicial review do not implicitly abrogate habeas corpus.

Congress began regulating immigration in 1875. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477. Between 1875 and 1891, the courts were authorized by the immigration acts to engage in broad review, including review of the facts on which the deportation or exclusion order rested. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). In 1891, Congress enacted the first in a series of "finality" provisions designed to remove the courts from the immigration process. The 1891 statute provided: "All decisions made by the inspection officers . . . touching the right of any alien to land, when adverse to such right, shall be final. . . . " Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085. This first finality provision applied to non-Chinese "excludable" aliens (i.e., aliens seeking entry into the country). Thereafter, Congress enacted

additional finality provisions continually extending the provision in virtually the same terms to additional categories of aliens.[7]

In *Ekiu*, the Court interpreted the 1891 finality provision for the first time. The Court emphasized that the alien in that case was subject to the Act's "finality" provision and was thus precluded from obtaining the level of review previously authorized by immigration statutes. The Court made clear, however, that the alien could still obtain habeas corpus – even though the finality provision nowhere made such an exception.

> An alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, *is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.* And Congress may, if it sees fit, as in . . . [prior] statutes . . . authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers. . . .

Id. at 660 (emphasis added and citations omitted).[8]

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[7] The second statute, enacted in 1894, imposed the same "finality" language on decisions denying admission to Chinese aliens: "In every case where an alien is excluded from admission into the United States under any law . . . the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final. . . ." Act of Aug. 18, 1894, ch. 301, § 6, 28 Stat. 252, 253. Preclusion statutes in 1907 and 1917 also contained "finality" provisions and employed nearly identical language as the prior statutes. Immigration Act of 1917, ch. 29, § 17, 39 Stat. 874, 887; Immigration Act of 1907, ch. 1134, § 25, 34 Stat. 898, 906-07.

[8] The preclusive effect of the finality provision was repeatedly reiterated. *See, e.g., Lem Moon Sing v. United States,*

The finality provisions governed judicial scrutiny of immigration decisions until Congress passed the 1952 Immigration and Nationality Act, making the APA's provisions for broad judicial review applicable to immigration decisions. *See Pedreiro*, 349 U.S. at 52. During this more than 60-year period, the Court consistently reaffirmed *Ekiu's* holding that although the finality provisions precluded broad judicial review, aliens facing a loss of liberty were "doubtless entitled" to the minimal level of review afforded in habeas. *Ekiu*, 142 U.S. at 660. In case after case, the Court refused to close off all access to the courts and continually reaffirmed the alien's right to habeas corpus to test the lawfulness of the order. *See, e.g., Zartarian v. Billings*, 204 U.S. 170 (1907); *Lapina v. Williams*, 232 U.S. 78 (1914); *Lewis v. Frick*, 233 U.S. 291 (1914); *Yee Won v. White*, 256 U.S. 399, 400 (1921); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). Five decades after *Ekiu* interpreted the first finality provision, the Court reiterated in *Bridges v. Wixon*, 326 U.S. 135, 149 (1945), that judicial review was barred but that the Court's role in "habeas corpus proceedings" remained. *See also id.* at 167 (courts may act "[o]nly in the exercise of their authority to issue writs of habeas corpus") (Stone, C.J., *dissenting on other grounds*).

In 1953, at the very end of this habeas period, the Court in *Heikkila* summarized the entire era and once again reaffirmed the unbroken rule, now of longstanding

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158 U.S. 538, 546-47, 549 (1895) ("authority of the courts to review the decision of the executive officers was taken away"); *Fok Young Yo v. United States*, 185 U.S. 296, 305 (1902) (finality provision is "[c]ongressional action [that] has placed the final determination of the right of admission in executive officers, without judicial intervention"); *Pearson v. Williams*, 202 U.S. 281, 285 (1906) (finality provision was intended to render the decision final "where it is most likely to be questioned – in the courts").

duration, that an immigration statute that precludes broad judicial review will not be read to eliminate habeas corpus by implication. The specific issue in *Heikkila* was whether, in light of the then-recently enacted Administrative Procedure Act, aliens could now obtain the broader judicial review that had been denied them for the past sixty years under the finality provisions. That question turned on the preclusive reach of the immigration finality provisions because the APA does not apply where the governing statutes expressly "preclude judicial review." 5 U.S.C. 701(a)(1). Reviewing the long history of the Court's treatment of the immigration finality provisions (beginning with its decision in *Ekiu*), the Court reiterated once again that the finality provision precluded broad judicial review: "Clearer evidence that . . . [the finality provision] is a statute precluding judicial review would be hard to imagine." *Id.* at 235. Accordingly, the Court concluded that the APA was inapplicable. But the Court nonetheless reaffirmed the right to habeas corpus.

Notably, the dissent in *Heikkila* stressed that it was precisely because the finality provision had long been understood to permit "resort to the court" to obtain "habeas corpus" scrutiny of deportation orders that the finality provision could not be viewed as a statute that precluded "judicial review." *Id.* at 239-40 (internal quotation marks omitted). The Court, in response, acknowledged that the finality provision had permitted habeas review but stressed that "it is the *scope of inquiry* on habeas corpus that differentiates use of the writ from *judicial review* as that term is used in the Administrative Procedure Act." *Id.* at 236 (emphasis added). The Court reaffirmed the longstanding understanding that the immigration act's finality provision precluded broad "judicial review" but not the narrower "habeas" inquiry: "We hold that deportation orders remain immune to

direct attack," *id.* at 236, and that aliens may "attack a deportation order only by habeas corpus." *Id.* at 235.

Congress is presumed to have been aware of this unbroken history when it enacted Section 1252(a)(2)(C)'s prohibition on "judicial review" without any mention of a repeal of habeas corpus or 28 U.S.C. 2241. Like the broadly preclusive statutes that this Court interpreted during the habeas era, IIRIRA should not be read as precluding the minimal level of judicial scrutiny traditionally afforded by habeas corpus. *See also Carlson v. Landon*, 342 U.S. 524, 537 nn.27, 28 (1952) (contrasting "judicial review" with "judicial intervention under the paramount law of the Constitution" and citing cases exercising habeas corpus review) (internal quotation marks omitted); *Pedreiro*, 349 U.S. at 50 (noting that *Heikkila* treated finality statute as precluding "judicial review" but not "habeas corpus"). *See also Sandoval v. Reno*, 166 F.3d 225, 235 (3d Cir. 1999) (noting distinction between "review" and habeas corpus in immigration context and citing *Heikkila*). Construing Section 1252(a)(2)(C) to preserve this minimal level of review also avoids the delicate constitutional questions raised by the preclusion of review over petitioners' statutory or constitutional claims. *See Felker*, 518 U.S. at 661.

2. Habeas corpus review encompasses questions of law like those raised by petitioners.

It is indisputable that throughout the decades when jurisdiction over immigration orders was governed by the "finality" provisions, and review was thus limited to the narrow inquiry allowed by habeas corpus, the Court continually resolved disputes over the proper construction of the immigration statutes. *See, e.g., Gonzales v. Williams*, 192 U.S. 1 (1904) (rejecting administrative construction of terms "alien" and "alien immigrant"); *Mahler v. Eby*, 264

U.S. 32, 44 (1924) (holding that the executive had not complied "with all the statutory requirements" in exercising his delegated authority); *Delgadillo v. Carmichael*, 332 U.S. 388, 390 (1947) (rejecting government assertion that alien's arrival "was 'the entry of the alien to the United States' within the meaning of the [Immigration] Act"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 8 (1948) (rejecting government's "meaning of the statutory words, 'sentenced more than once' ").[9]

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[9] The cases arose under each of the successive statutes that rendered the immigration decisions "final." Cases under the 1891 act include *Zartarian v. Billings*, 204 U.S. 170, 174, 176 (1907) (resolving on habeas "construction of this law and the meaning of the phrase" for purpose of deciding citizenship claims, while holding that "review by the courts" of challenge to executive decision that alien had "dangerous contagious disease" was barred because finding of immigration board is "final," citing *Ekiu*).

Cases under the 1894 act include *Yee Won v. White*, 256 U.S. 399, 400 (1921) (habeas corpus writ properly denied "unless, *as a matter of law*" alien could demand admission of wife and children under proper interpretation of treaty provision) (emphasis added).

Cases under the 1907 act include *Low Wah Suey v. Backus*, 225 U.S. 460, 476-77 (1912) (deciding on habeas, *inter alia*, whether "operations of the statute" and "congressional purpose" exempt wife of a United States citizen from deportation as "alien prostitute"); *Lapina v. Williams*, 232 U.S. 78, 88 (1914) (reviewing in habeas corpus "Congress's . . . intent and purpose as expressed in legislation" regarding deportation statute); *Lewis v. Frick*, 233 U.S. 291 (1914) (reviewing on habeas whether deportation statute applied to him); *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (rejecting the government's "construction of the [immigration] statute" and noting that when "a commissioner of immigration is exceeding his power, the alien may demand his release on habeas corpus").

Cases under the 1917 act include *United States ex rel. Mensevich v. Tod*, 264 U.S. 134, 136 (1924) (resolving dispute over

In this case, petitioners' claim raises a pure question of law: namely, did the BIA err in deciding that the repeal of Section 1182(c) applies to events that occurred before IIRIRA's enactment. This claim concerns solely whether petitioners were denied the opportunity to apply for relief in violation of the statute. As a result of its construction of the 1996 amendments, the BIA held, as a matter of law, that petitioners had lost their eligibility to apply for relief and hence were subject to mandatory deportation. Petitioners thus seek a judicial determination of their statutory eligibility and not review of any discretionary action by the BIA.

The Court has recognized the sharp distinction between legal claims challenging whether an alien was

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"construction of a statute" concerning the alien's claim that designation of Poland as the country to which he should be deported violated the statute); *Weedin v. Chin Bow*, 274 U.S. 657, 659 (1927) (deciding on habeas "construction of this section" governing claim to citizenship); *United States ex rel. Claussen v. Day*, 279 U.S. 398, 400-01 (1929) (deciding what constituted "an entry within the meaning of the [immigration] act" for purpose of determining whether an alien had committed a crime of moral turpitude "within five years after entry"); *Philippides v. Day*, 283 U.S. 48, 50 (1931) (holding 1917 Act's statute of limitations inapplicable to alien under 1924 Act); *United States ex rel. Stapf v. Corsi*, 287 U.S. 129, 132 (1932) (deciding whether an alien's temporary trip abroad subjected him to the "entry" provisions of the Immigration Act of 1924); *Costanzo v. Tillinghast*, 287 U.S. 341, 343 (1932) (determining a "construction of . . . [the immigration] act of 1917" to decide statute of limitations); *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 424-25 (1933) (interpreting "entry" in statute to include reentry); *Hansen v. Haff*, 291 U.S. 559, 562 (1934) (extramarital relations do not constitute "any other immoral purpose" within meaning of the statutory deportation provisions); *Jordan v. De George*, 341 U.S. 223, 226 (1951) ("interpret[ing] the provision of the statute" to decide meaning of "crime involving moral turpitude").

denied the opportunity to apply for a waiver in violation of law, and claims challenging the discretionary manner in which the waiver was adjudicated. For example, in *Jay v. Boyd*, 351 U.S. 345 (1956), the Court explained that an applicant had "a right to a ruling on [his] eligibility" for a waiver, *id.* at 353, based on the "statutory requirements for eligibility." *Id.* at 351. The determination of an applicant's "eligibility" is based on "specific statutory standards" and requires a legal determination. *Id.* at 353. That legal determination is distinct from the actual exercise of discretion, which turns on "who among qualified applicants" should "receive the ultimate relief" – a decision within the discretion of the Attorney General. *Id.* at 353-54.

Because petitioners challenge the BIA's refusal to exercise discretion (and not a discretionary decision), their claim is reviewable in habeas corpus. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court reversed the BIA's denial of discretionary relief and held that habeas corpus review encompassed the BIA's "*failure to exercise* its own discretion" as required by regulation. *Id.* at 268 (emphasis in original). *Accardi*'s exercise of habeas jurisdiction is consistent with a long line of decisions by the courts of appeals during the habeas corpus era reviewing the agency's refusal to exercise discretion as required by law.[10]

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[10] *See, e.g, MacKusick ex rel. Pattavina v. Johnson*, 3 F.2d 398, 401 (1st Cir. 1924) (reviewing finding of statutory ineligibility); *Maniglia v. Tillinghast*, 24 F.2d 489, 491 (1st Cir. 1925) (examining claim of failure to exercise discretion); *Gabriel v. Johnson*, 29 F.2d 347, 350 (1st Cir. 1928) (same); *Stone ex rel. Colonna v. Tillinghast*, 32 F.2d 447, 449 (1st Cir. 1929) (same); *Domenici v. Johnson*, 10 F.2d 433, 437 (1st Cir. 1926) (reviewing finding of statutory ineligibility); *United States ex rel. Devenuto v. Curran*, 299 F. 206, 210 (2d Cir. 1924) (same); *United States ex rel. De Sousa v. Day*, 22

In sum, the immigration laws of this country have never denied a judicial forum to aliens who assert that their deportation orders were issued in violation of the governing statute. While Congress has, on repeated occasions, severely restricted the role of the judiciary and the scope of judicial review over the deportation and exclusion of aliens, those provisions have never been interpreted to preclude a judicial determination in habeas corpus of whether the agency is acting in violation of its statutory authority. Like those prior statutes, IIRIRA should be construed to preserve the scope of inquiry traditionally available in habeas corpus proceedings, irrespective of whether that review takes place in a formal habeas corpus action or through a petition for review in the court of appeals.

C. *Heikkila v. Barber* Demonstrates That The Constitutional Floor For Habeas Corpus Encompasses Petitioners' Claims.

As noted above, the Court's decision in *Heikkila v. Barber*, 345 U.S. 229, explained that habeas corpus had always been preserved for aliens challenging a deportation order. More fundamentally, however, it found that the habeas review exercised throughout that lengthy period was required by the Constitution. Consequently, *Heikkila* confirms that the review exercised by this Court

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F.2d 472, 474-75 (2d Cir. 1927) (finding failure to exercise discretion); *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (same); *United States ex rel. James v. Shaughnessy*, 202 F.2d 519 (2d Cir.) (addressing claim of failure to exercise discretion), *cert. denied*, 345 U.S. 969 (1953); *United States ex rel. Berman v. Curran*, 13 F.2d 96, 98 (3d Cir. 1926) (finding failure to exercise discretion); *Gonzales-Martinez v. Landon*, 203 F.2d 196, 198 (9th Cir.) (upholding finding of statutory ineligibility), *cert. denied*, 345 U.S. 998 (1953).

during the pre-1952 habeas era represents the constitutional floor below which Congress cannot reduce review.

Heikkila twice explained that the pre-1952 statutes rendering immigration decisions "final" had reduced judicial review to the constitutional minimum. The Court assessed the congressional purpose of the provisions along with "a quarter of a century of consistent judicial interpretation." *Id.* at 234. Based on "both the statutes and . . . the decisions of this Court," *Heikkila* found that "Congress had intended to make these administrative [immigration] decisions nonreviewable to *the fullest extent possible under the Constitution.*" *Id.* (emphasis added). The Court repeated that conclusion in a second, equally pointed statement: the "finality" provision enacted by Congress "clearly had the effect of precluding judicial intervention . . . except insofar as *required by the Constitution.*" *Id.* at 234-35 (emphasis added).[11]

The Court's earliest cases in the finality era also make clear that the preservation of habeas is constitutionally compelled. In *Ekiu*, 142 U.S. 651, discussed in point I.B., *supra*, the Court noted that Congress had precluded the review previously authorized in the immigration acts but stated that a resident alien "is *doubtless entitled* to a writ of habeas corpus to ascertain the lawfulness of the restraint." *Id.* at 660 (emphasis added). Even if *Ekiu*'s holding is viewed principally as one of statutory construction, the Court's rationale was plainly not so limited. *Cf. Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (noting that Court's earlier immigration decision in *Kwong Hai Chew v.*

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[11] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1397 (1953) ("speaking for the Court, Justice Clark there held that judicial review in deportation cases is 'required by the Constitution' ").

Colding, 344 U.S. 590 (1953), involved a holding "of statutory construction but a ruling of constitutional dimension"). *See also Henderson v. INS*, 157 F.3d 106, 112-16, 120 (2d Cir. 1998) (reviewing Court's pre-1952 habeas cases in the finality era and finding that habeas review during that period was constitutionally compelled, stating that government's position that statutory retroactivity claims could be insulated from all review was "to put it mildly, not only at war with the historical record . . . [of] at least a hundred years . . . [but] also hard to square with the core conception of habeas corpus"), *cert. denied*, 526 U.S. 1004 (1999).

Heikkila and the Court's earlier decisions thus establish that the habeas review that was exercised during the pre-1952 finality period is constitutionally compelled. Nor is there any question that the constitutionally-required habeas review endorsed by the Court covers statutory claims. Indeed, as already set forth, *Heikkila* focused specifically on the difference in the scope of review between "judicial review" and habeas corpus, emphasizing that the broader scope in judicial review was precisely what "differentiates" the two forms of review. 345 U.S. at 235-36. Yet, as previously discussed, despite the limited scope of habeas review, this Court (and the lower courts) consistently reviewed statutory claims during the period when the only review available was that "required by the Constitution." *Id.* at 235.

Heikkila itself specifically cited finality-era cases that explicitly stated that the scope of habeas review included statutory claims. For example, *Heikkila* cited to *Kessler v. Strecker*, 307 U.S. 22, 34 (1939), which stressed that although a court "upon habeas corpus" has limited authority, it may overturn an administrative ruling if there is an "error of law." *Heikkila* also twice cited to a particular passage in *Bridges v. Wixon*, 326 U.S. 135 (1945),

that expressly articulated the scope of habeas review during the finality era. *See Heikkila*, 345 U.S. at 230 n.1, 235. That passage states, in relevant part: "[I]n the exercise of their authority to issue writs of habeas corpus . . . courts [are authorized to] inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. . . . " *Bridges*, 326 U.S. at 167 (Stone, C.J., *dissenting on other grounds*); *see also id.* at 149 (opinion of the court) (exercising jurisdiction on habeas to review whether alien "was ordered deported for reasons *not specified by Congress*") (emphasis added). *See also* note 9, *supra* (collecting cases exercising habeas jurisdiction over review of statutory claims).

In short, when judicial scrutiny had been reduced "to the fullest extent possible under the Constitution," *Heikkila*, 345 U.S. at 234, this Court and the lower federal courts exercised habeas review and that review included statutory claims. Accordingly, the preclusion provision of IIRIRA should be construed to leave some forum for petitioners to raise their pure questions of law. But if it cannot be, the statute must be invalidated as unconstitutional.

II. JUDICIAL SCRUTINY OF PETITIONERS' CONSTITUTIONAL AND STATUTORY CLAIMS IS ALSO GUARANTEED BY THE BROAD PRINCIPLES OF THE SUSPENSION CLAUSE, DUE PROCESS, AND ARTICLE III.

A. The Suspension Of Habeas Corpus Clause Entitles Aliens To Judicial Scrutiny Of Legal Claims Challenging Executive Deportation Orders.

The Suspension Clause provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public

Safety may require it." *See* U.S. Const. Art. I, § 9, cl. 2. The "Great Writ" was "[c]onsidered by the Founders as the highest safeguard of liberty" and was "written in the Constitution" for that reason. *Smith v. Bennett*, 365 U.S. 708, 712 (1961). Indeed, the Framers included the Suspension Clause in the original document even though the Constitution included few provisions protecting individual rights before passage of the Bill of Rights.

The writ has always been viewed as an indispensable feature of a country governed by the rule of law: "It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., *concurring*); *see also Parisi v. Davidson*, 405 U.S. 34, 47 (1972) (Douglas, J., *concurring*) (the Court "has consistently reaffirmed the preferred place of the Great Writ in our constitutional system"); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830).

With respect to the scope of review protected by the Suspension Clause, two points are beyond dispute. First, the common law traditions and usages of the writ in England and this country figure prominently. *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("For the meaning of the term habeas corpus, resort may unquestionably be had to the common law"); *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) ("By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement . . . was thus an integral part of our common-law heritage"); *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) ("To

ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law . . . and to the decisions of this Court interpreting and applying the common-law principles") (quoting *McNally v. Hill*, 293 U.S. 131, 136 (1934)). *See also Ex parte Parks*, 93 U.S. 18, 21 (1876).

Second, and critically, the historic core of the writ was to serve as a safeguard against *executive* detention without judicial process, in contrast to the post-conviction relief context where the writ is invoked to challenge *judicially*-sanctioned detention. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (common law habeas writ's "most basic purpose" was to avoid deprivations of liberty by executive "without referring the matter to a court"); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., *concurring*) ("[T]he traditional Great Writ was largely a remedy against executive detention"); *Brown*, 344 U.S. at 533 (Jackson, J., *concurring*) (writ's historical purpose was to test executive detention ordered "without judicial trial"). The Court has thus specifically cautioned against conflating criminal cases involving post-conviction relief with cases where prior judicial review is absent. In stressing this distinction, the Court has specifically cited immigration cases as among those where no prior judicial review has occurred. *See, e.g., Sunal v. Large*, 332 U.S. 174, 177 n.3 (1947) (a direct appeal "could have been taken," and "[w]e therefore lay to one side [immigration and other] cases . . . where the order of the agency . . . was not subject to judicial review") (citing *Bridges v. Wixon*, 326 U.S. 135 (1945)). *See* Pet. App. at 30a (citing *Henderson v. INS*, 157 F.3d 106, 120 (2d Cir. 1998), and stressing distinction under Suspension Clause between post-conviction and executive detention); *Shah v. Reno*, 184 F.3d 719,

723-24 (8th Cir. 1999) (same); *Goncalves v. Reno*, 144 F.3d at 118 n.8.[12]

Where an executive official deprives an individual of liberty, and the executive order has not been "subject to judicial review" at any point, *Sunal*, 332 U.S. at 177 n.3, the scope of the common-law writ has always included review sufficient to ensure that the order is consistent with the *legal* limits on the executive's authority. Thus, as we have already discussed, habeas corpus has always been available in this country to test the legality of deportation orders where no other commensurate review was made available. That specific tradition in the immigration context is consistent with the broader common law habeas traditions, in England and this country, governing the use of the writ to test the legality of executive detention.

The historic purpose of habeas corpus at English common law was to test the *legality* of detention imposed without judicial process. Thus, an inquiry into detention

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[12] Even commentators who have expressed criticism of habeas corpus review in the post-conviction context have emphasized the writ's historic use as a remedy against executive detention without judicial process. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law*, 76 Harv. L. Rev. 441, 475 (1963) ("It should not, after all, be forgotten that the classical function of habeas corpus was to assure the liberty of subjects against detention by the *executive* or the military *without any court process* at all, not to provide postconviction remedies for prisoners.") (emphasis added); Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 465-66 (1966) ("If a seventeenth-century lawyer ever urged that the function or office of habeas corpus was the 'vindication of due process,' he would undoubtedly have had in mind the use of habeas corpus to review executive detentions and to release persons wrongfully imprisoned by the crown") (citations omitted).

included review of questions of law; indeed, England has no formal constitution, and thus, the writ could not be limited to an American understanding of "constitutional" errors. *Shah*, 184 F.3d at 723; *Henderson*, 157 F.3d at 121 n.13. *See generally* William S. Church, *A Treatise of the Writ of Habeas Corpus*, (2d ed. 1893); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2521-536 (1998) (collecting cases and treatises); *see, e.g., Gardener's Case*, 78 Eng. Rep. 1048 (K.B. 1600).

The common law habeas traditions in this country, both before and after 1789, confirm that, in the *executive* detention context, the scope of the writ has included all review necessary to test the legality of the detention order. The colonies inherited the common law's understanding of the writ from England. William F. Duker, *Constitutional History of Habeas Corpus* 115 (1980). Beginning shortly after the adoption of the Constitution, and consistently thereafter, claims that detention was based on legal error were reviewable in habeas corpus. *See, e.g., Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452-53 (1806) (granting writ of habeas corpus where prisoner was committed pursuant to illegal warrant); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 135-37 (1807) (ordering release of petitioners held on warrant for treason because warrant was not supported by sufficient evidence).[13] *See generally*

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[13] *See also Ex parte Randolph*, reprinted in *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 11 n.1 (1835) (Marshall, C.J.) (interpreting statute under which individual was detained by solicitor of the treasury to determine whether individual fell within statutory provisions); *In re Kaine*, 55 U.S. (14 How.) 103, 114-16 (1852) (deciding legal question of whether commissioner had power under extradition statute to commit detainee); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (writ should issue where military commission did not have legal authority to issue

William S. Church, *A Treatise on the Writ of Habeas Corpus* 217 (1st ed. 1884) ("The issue raised on the hearing of a habeas corpus may be one of law simply. . . . [t]hat is, when the detention of the prisoner is claimed to be illegal, and he claims a legal exemption from it."); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 332 (1st ed. 1858) ("Where the return shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process").

In short, this case implicates the historic core of the writ, which ensures that executive detention is subject to judicial scrutiny. In this context, habeas corpus practice has always included review of pure legal claims, constitutional and nonconstitutional. The Justice Department cannot have the final say on the meaning of the Immigration Act.

B. Due Process Requires Judicial Determination Of Petitioners' Constitutional And Statutory Claims.

IIRIRA would independently violate the Due Process Clause of the Fifth Amendment if it forecloses judicial scrutiny of petitioners' constitutional or statutory claims. Deportation implicates fundamental interests "basic to human liberty and happiness," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), and thus, the Court has long held that deportation must comport with the procedural protections mandated by due process. *See Galvan*

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judgment resulting in unlawful imprisonment of petitioner); *Wright v. Henkel*, 190 U.S. 40, 58 (1903) (interpretation of New York state law in extradition case); *Oteiza v. Jacobus*, 136 U.S. 330, 334-35 (1890) (interpretation of extradition statute); *Benson v. McMahon*, 127 U.S. 457, 460-63 (1888) (interpretation of language of treaty in extradition case).

v. Press, 347 U.S. 522, 531 (1954). As the Court repeatedly has recognized, the "stakes are indeed high and momentous for the alien who has acquired his residence here," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), and are particularly "weighty" where, as here, the aliens are long-time legal permanent residents who stand to "lose the right to . . . [live with their] immediate family, a right that ranks high among the interests of the individual." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (noting that "deportation . . . visits a great hardship on the individual" and that the "liberty of an individual is at stake").

Traditional common law procedural protections provide a critical benchmark in determining whether due process has been violated. While "all deviations from established [common law] procedures" do not result in "constitutional infirmity," the abandonment of well-established safeguards of common law procedure "raises a presumption" that due process has been violated. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994). Indeed, the Court has noted that the "basic procedural protections of the common law" have rarely been abandoned in our constitutional history. *Id.* at 430.

In *Honda*, for example, the Court held that eliminating judicial review over the size of jury punitive damage awards violated procedural due process because judicial oversight of jury awards was part of a longstanding "common law practice." *Id.* at 421. The Court noted that the presumption in favor of common law procedural safeguards is particularly strong where, as here, "the absent procedures would have provided protection against arbitrary and inaccurate adjudication." *Id.* at 430. Under such circumstances, the Court "has not hesitated to find the proceedings violative of due process." *Id.*

As in *Honda*, the circumstances here involve long-standing practice. Administrative deportation orders have historically been subject to judicial scrutiny to test their legality. No contrary tradition or practice has ever existed in this country. Individuals subject to deportation by an administrative official have always had recourse, through habeas corpus or some other commensurate means, to judicial scrutiny of the legality of the administrative order.

More generally, where an administrative agency has been vested with the power to deprive an individual of liberty (or traditional property rights), judicial process has been available as a necessary safeguard. Liberty "cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of . . . imprisonment." *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) (affirming power of ICC to compel documents but noting as axiomatic that contempt powers could not extend to ordering imprisonment without any judicial process). *See Superintendent v. Hill*, 472 U.S. 445, 449-50 (1985) (emphasizing that, even in the prison setting, "difficult" due process questions would be raised by the denial of judicial review over an administrative board's decision to deny a prisoner liberty in the form of "good time" credits); *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., *concurring*) (stressing the "importance of independent judicial review" in immigration "area where administrative decisions can mean the difference between freedom and oppression"). *Cf. Chicago, Milwaukee, and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 (1890) (due process violated where "the company is deprived of the power of

charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery"); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931) (judicial review required for federal statutory tax claim); *South Carolina v. Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., *concurring*) (noting "the established rule" that due process requires judicial review of tax assessment claims).[14]

The government cannot contend that the danger of arbitrary deprivations of liberty in the immigration area "has in any way subsided over time," *Honda*, 512 U.S. at 432, and thus, that it is unnecessary to provide "a reasonable substitute for" judicial oversight, *id.* at 436 (Scalia, J., *concurring*). Moreover, permitting review of *legal* claims under the narrow common law habeas standard will not

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[14] *See also* Louis L. Jaffe, *Judicial Control of Administrative Action* 384 (1965) ("[A] person may be temporarily deprived of his property (and even, it has been suggested, of his liberty) by an illegal order, but . . . there must be an opportunity ultimately for a judicial test of legality") (internal citations omitted); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 248 n.48 (1990) ("That all questions arising in the administration of the Interstate Commerce Act, for example, or between a taxpayer and the government under the tax laws, could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed") (quoting *Crowell v. Benson*, 285 U.S. 22, 87 n.23 (1932) (Brandeis, J., *dissenting*); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 15-16 (1983) (historically, "[j]udicial control . . . [has been] at its maximum when coercive governmental conduct was involved"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390 (1953) (stating that "the courts [have] a responsibility to see that statutory authority was not transgressed" in coercive enforcement context).

sanction case-specific review of factual and discretionary determinations that have no systemic impact on the implementation of the Nation's immigration laws. It will, however, permit the courts to ensure that the agency remains within the parameters of its delegated legal authority. *See St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., *concurring*) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous *rule of law* was applied.") (emphasis added).

C. Article III Requires Judicial Scrutiny Of Petitioners' Claims.

Article III, § 1 provides that the federal judicial power shall be vested in judges with tenure and salary protection. The Court has not read the language of Article III literally and has permitted significant federal adjudication to be conducted by administrative agencies. However, the Court has also made clear that Article III protects values that are fundamental to the constitutional plan and imposes critical limits on the use of non-Article III federal adjudicative bodies. *See generally Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-48 (1986). In particular, the Court has noted that Article III "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government," thereby protecting both structural and individual interests. *Schor*, 478 U.S. at 848 (internal quotation marks and citations omitted).

Typically, the Court's jurisprudence in this area has focused on whether Article III prohibits Congress from placing the *initial* adjudication of certain disputes in an

administrative agency, and has generally upheld such schemes. *See Schor*, 478 U.S. at 852; *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 592 (1985). *But see Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In these cases, however, appellate review has remained available as an ultimate safeguard, and the Article III question was not whether *all* judicial review could be repealed at any stage. *See Schor*, 478 U.S. at 853 (stressing that "the legal rulings of the CFTC . . . are subject to de novo [appellate] review"); *Northern Pipeline*, 458 U.S. at 115 (White, J., *dissenting*) ("[T]he presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers").

Here, the government contends that IIRIRA should be construed to preclude *all* review over petitioners' retroactivity claim, by any means and at any stage – initial and appellate, including in this Court. Thus, under no circumstances can the government contend that its reading of IIRIRA would preserve the "essential attributes of judicial power" in the courts, one of the factors stressed in the Court's Article III cases. *Schor*, 478 U.S. at 851 (internal citations omitted). Furthermore, the issues raised by petitioners are pure legal claims. Review of such claims implicates the core, traditional role of the courts as the ultimate check against ongoing violations of the law. *See Chadha v. INS*, 634 F.2d 408, 431 & n.32 (9th Cir. 1980) (Kennedy, J.) (noting that review of statutory criteria applied by administrative officials is an "essential judicial function" and emphasizing that courts provide an indispensable "structural check on the Executive"), *aff'd*, 462 U.S. 919 (1983).

Moreover, the complete preclusion of review in this case is especially problematic because, unlike in other contexts, the issues that would be insulated from all judicial scrutiny are not politically dry issues that have

been left to an independent agency with expertise over a narrow area of specialization. In *Schor*, for example, not only was appellate review preserved, but the issues there (relating to commodities trading) were ones that Congress could plausibly have assumed would be "relatively free from political pressures." 478 U.S. at 855; *see also id.* at 836 (noting that Congress believed that agency's technical work was in an area that is unlikely to attract the "political winds that sweep Washington") (quoting House Report); *Northern Pipeline*, 458 U.S. at 115 (White, J., *dissenting*) (noting diminished threat to separation of powers where Article I courts adjudicate issues of "little interest to the political branches").

The Attorney General is subject to acute political and public pressure as the official responsible for implementation and enforcement of the immigration laws. Yet the government seeks to confer on the Justice Department the unilateral and unreviewable power to determine the statutory limits on its own enforcement authority. With so much at stake for legal residents facing deportation from the country (including the consequences for U.S. citizen family members), there must be an independent judicial check to ensure that the power of deportation is exercised within the limits set by law. *See generally The Federalist* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("there is no liberty if the power of judging be not separated from the legislative and executive powers") (quoting Montesquieu); *United States v. Will*, 449 U.S. 200, 219 (1980) (absence of independent judges was "one of the evils that had brought on the Revolution and separation").

Congress may of course choose to give an agency responsibility for both enforcement and adjudication. But the Court has never permitted the commingling of enforcement and adjudication in one agency without any

judicial review of systemic legal challenges directly affecting an individual's liberty. *Compare Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910) (rejecting due process challenge to commingled procedure, but noting that judicial review always remained to ensure that "[e]xecutive officers conform their action to the mode prescribed by Congress"). As the Court explained in *INS v. Chadha*, 462 U.S. 919, 951 (1983), another case involving immigration relief provisions, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

The government has opposed petitioners' Article III argument on the ground that immigration cases involve "public rights." But the Court has refused "to make determinative for Article III purposes the distinction between public rights and private rights" and has stressed that "practical attention to substance rather than doctrinaire reliance on formal categories" must inform the Article III analysis. *Schor*, 478 U.S. at 847-48, 853; *see also Thomas*, 473 U.S. at 586. Thus, any attempt to attribute dispositive or near-dispositive significance to the public nature of the rights at issue in this case is misplaced. In any event, whatever general significance may be attributed to the distinction between public and private rights, that distinction has never been understood, much less applied, to permit the preclusion of all review, including by habeas corpus, where an individual is subject to an administrative deprivation of liberty. Indeed, in the earliest immigration cases under the finality provisions of the 1890s, the Court cited "public rights" cases for the proposition that broad judicial review could be precluded while simultaneously holding that the alien "is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." *Ekiu*, 142 U.S. at 660 (citing *Murray's*

Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)).

The Framers unquestionably viewed an independent judiciary as an indispensable feature of a Nation premised on the rule of law, where every individual and group could be assured an impartial assessment of their rights. As Hamilton argued in *The Federalist* No. 78, leaving the judiciary without insulation from the political branches would "be fatal to their necessary independence," thus undermining the requirement "that nothing would be consulted but the Constitution and the laws." *The Federalist* No. 78, *supra*, at 471. Nowhere is the need for independent scrutiny more acutely implicated than in this case, where the personal interests are of profound importance, the issues touch on powerful political and public passions, and the government's proposed construction of IIRIRA would eliminate *all* judicial oversight over the Attorney General's interpretation of his statutory authority.

III. PETITIONERS' CONSTITUTIONAL AND STATUTORY CLAIMS CAN BE REVIEWED IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS.

The remaining question is whether the proper *forum* for review of petitioners' constitutional and statutory claims is the district court or the court of appeals. Either forum is permissible provided that the scope is commensurate with the level of inquiry historically available via habeas corpus. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("habeas" inquiry can be provided by an adequate mechanism in any court).

1. Petitioners submit that IIRIRA can be construed to preserve review in the court of appeals of petitioners' statutory and constitutional claims, rendering resort to

habeas corpus in the district courts under 28 U.S.C. 2241 unnecessary. Section 1252(a)(1) provides a grant of jurisdiction to the courts of appeals to review final orders of removal by a petition for review. In the absence of the prohibitions contained in Section 1252(a)(2)(C), subsection (a)(1) would plainly permit review of petitioners' claims. As discussed in point I, *supra*, Section 1252(a)(2)(C) prohibits "judicial review" of petitioners' claims, but does not preclude habeas corpus. Therefore, Section 1252(a)(2)(C) should be construed as precluding only the broad review generally available and not the review available in habeas corpus. Aliens with claims traditionally cognizable in habeas corpus could continue to bring their claims by petition for review to the court of appeals, but claims that fell outside of the traditional habeas inquiry would be barred. Section 1252(a)(2)(C) should thus be understood as precluding the court of appeals from engaging in broad "judicial review" but not the narrow "habeas" inquiry that the courts have always exercised in the face of preclusion provisions and, moreover, that *Heikkila* recognized as "constitutionally required." This procedure for review would not mean that aliens subject to Section 1252(a)(2)(C) would file habeas corpus petitions in the courts of appeals. Like other aliens, they would file petitions for review, but unlike in other cases, the courts of appeals' inquiry would be limited to the scope that is required by habeas.

Notably, the government insists that Section 1252(a)(2)(C) should not be read literally but must be interpreted in light of background norms of statutory construction. The government argues that the courts of appeals retain jurisdiction, notwithstanding Section 1252(a)(2)(C), to address "substantial constitutional" challenges to the denial of Section 1182(c) relief. Despite Section 1252(a)(2)(C)'s language, the government argues

that the provision must be read not to bar review of *constitutional* claims unless there is clear and convincing evidence affirmatively barring such review, which it finds lacking here. *See* Pet. App. 28a. But Section 1252(a)(2)(C) should not be read only on the basis of the canon on which the government relies, and not in light of this Court's longstanding practice of refusing to find implicit repeals of habeas corpus in the immigration context. That is particularly true because the government's interpretation of Section 1252(a)(2)(C) would not avoid the profound constitutional questions presented by the statute under the Suspension Clause, Due Process and Article III, if it were to foreclose judicial scrutiny of executive detention based on the BIA's misconstruction of its own governing statute. *See Henderson*, 157 F.3d at 119-20.[15]

2. If Section 1252 cannot be construed to preserve an adequate scope of inquiry in the court of appeals, then 28 U.S.C. 2241 provides the fail-safe procedure for judicial determination of petitioners' constitutional and statutory claims. The government contends that Section 2241 is not available because IIRIRA's permanent amendments have repealed all access to the district courts to challenge final removal orders and that, even before IIRIRA, the amendments made by the 1961 Immigration Act and AEDPA repealed Section 2241 jurisdiction for aliens seeking to challenge a final order of deportation. The Second Circuit thoroughly canvassed the government's arguments and found that none of the provisions on which the government relied mentions Section 2241, much less contains the

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[15] As noted in the Statement, *supra*, the circuits that have held that the proper forum for review is the court of appeals have either left open the question of the available scope of review that would be afforded or have strongly presumed that review of petitioners' retroactivity claim is not foreclosed. *See LaGuerre*, 164 F.3d at 1041.

requisite express directive to repeal that grant of jurisdiction. Pet. App. 15a-19a, 24a-26a.

In *Felker*, 518 U.S. 651, the Court confronted a statutory provision enacted by AEDPA that was unquestionably intended generally to restrict access to the Supreme Court. The Court held, however, that *all* access to this Court was not precluded and that the petitioner in that case could file an original habeas petition under Section 2241 to obtain review of his claims. The Court emphasized that the statute nowhere "mentions" Section 2241. *Id.* at 660. Given the absence of any such express mention, and the delicate constitutional questions that would have arisen had this Court's appellate jurisdiction been wholly eliminated, the Court emphasized the longstanding rule disfavoring repeals of habeas jurisdiction "by implication" and held that Section 2241 jurisdiction had not been eliminated. *Id.* at 660-61.

Here also, IIRIRA does not expressly mention the independent grant of jurisdiction in 28 U.S.C. 2241 (nor is it anywhere mentioned in the Act's legislative history). This Court should not find a repeal of Section 2241 without an explicit directive that Congress deliberately intended to repeal a grant of jurisdiction that has served as one of the cornerstones of liberty in this country since 1789 and to compel this Court to decide the resulting constitutional questions.

As the court of appeals decision sets forth, the government has argued that IIRIRA and earlier enactments satisfy the *Felker* express repeal requirement. Pet. App. 16a. Yet, the government has never disputed that the legislation is devoid of any mention of Section 2241. Instead, it has relied on the various provisions that "channel" review of claims to the court of appeals and has argued that Congress's intention with respect to Section 2241 must be gleaned from those general provisions.

That is necessarily an argument that relies on repeal by implication.

The principal provisions cited by the government are Sections 1252(a)(1) and 1252(b)(9). Both apply to "judicial review" and nowhere mention Section 2241.[16] The purpose of these provisions is to channel claims into the review of final orders in cases where judicial review in the courts of appeals *is* available.[17] No IIRIRA provision specifically addresses whether habeas corpus under Section 2241 is available as a final safeguard to allow claims historically protected by habeas corpus to be reviewed in cases where no other forum is available. *See* Pet. App. 23a, 33a; *Liang v. INS*, 206 F.3d 308, 317 (3d Cir. 2000)

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[16] Section 1252(a)(1) provides that "*Judicial review* of a final removal order [other than one issued against certain aliens excluded at the border] . . . is governed only" by the requirements of the Hobbs Act, except as specifically modified. 8 U.S.C. 1252(a)(1) (emphasis added). Section 1252(b)(9) provides that "*Judicial review* of all questions of law or fact, . . . shall be available only in judicial review of a final order under this Section." 8 U.S.C. 1252(b)(9) (emphasis added). Moreover, subsection (b)(9) appears in subsection (b), which in turn refers back to "review of an order of removal under *subsection (a)(1)*," 8 U.S.C. 1252(b)(9) (emphasis added), which applies only to "judicial review" of a final removal order.

[17] Section 1252(b)(9), in particular, was directed at a very specific issue under pre-IIRIRA practice whereby some claims were litigated in the district courts because the term "final order" in the pre-1996 INA did not encompass all issues arising from deportation proceedings. *See, e.g., Cheng Fan Kwok v. INS*, 392 U.S. 206, 215-16 (1968); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (discussing practice). Section 1252(b)(9) was enacted to consolidate additional claims into the review of final orders to ensure that the courts of appeals' review would encompass *all* questions "arising from any action taken or proceeding brought to remove" an alien.

("None of the provisions [of IIRIRA] . . . expressly refers to habeas jurisdiction or 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction"), *petition for cert. filed sub nom. Rodriguez v. INS*, No. 00-753; *Mahadeo v. Reno*, 226 F.3d 3, 8 (1st Cir. 2000) ("IIRIRA's permanent rules . . . lack the kind of explicit language Congress must use if it wants to repeal . . . § 2241"), *petition for cert. filed*, No. 00-962.

The government also argues that, even absent IIRIRA, Section 2241 is not available to challenge final orders because it was eliminated by AEDPA and the 1961 amendments. Cert. Pet. [INS] at 4, 24, *INS v. St. Cyr* (No. 00-767).[18] The 1961 amendments vested the courts of appeals with the "sole and exclusive" review of final orders of deportation, *see* former 8 U.S.C. 1105a(a), but also explicitly provided for habeas corpus jurisdiction in subsection (a)(10). The government contends, however, that Section 1105a(a)(10) was intended to be the only available grant of habeas jurisdiction after 1961 because the courts of appeals were vested with exclusive jurisdiction except as specifically enumerated in Section 1105a. The 1961 amendments, however, nowhere expressly repealed Section 2241, and the circuits that addressed the issue understood that both grants of habeas jurisdiction thus remained available. *See, e.g., Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1255 (9th Cir. 1980) (finding jurisdiction to review deportation order under both "1105a(a)(10) and . . . [Section] 2241"); *Orozco v. INS*, 911 F.2d 539, 541 (11th Cir. 1990). Moreover, the 1961 Act's legislative history not only noted the continuing availability of habeas jurisdiction, but specifically referenced

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[18] This contention, that Section 2241 was repealed prior to IIRIRA's amendments, was rejected by ten of the eleven circuits to reach the question. *See* note 3, *supra*.

the federal Habeas Corpus Act.[19] *See Sandoval v. Reno*, 166 F.3d 225, 234 (3d Cir. 1999) (quoting legislative history); *see also Bowrin v. INS*, 194 F.3d 483, 487 (4th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1298 (11th Cir. 1999).

The contention that AEDPA eliminated Section 2241 is likewise erroneous because AEDPA § 401(e), 110 Stat. 1268, repealed only the specific INA habeas provision in Section 1105a(a)(10), and did not mention Section 2241. And, as noted above, the case law against which AEDPA was enacted assumed that both Section 2241 and Section 1105a(a)(10) conferred habeas jurisdiction after 1961. Thus, Congress could not simply have assumed that the repeal of Section 1105a(a)(10) would effectuate a repeal of the independent grant of habeas jurisdiction in Section 2241.

Finally, the government has argued that a repeal of Section 2241 should be found based on the "streamlining" goals of the IIRIRA legislation, notwithstanding the absence of a specific textual repeal of Section 2241. The government maintains that permitting review in a Section

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[19] When it first enacted Section 1105a in 1961, Congress expressly discussed habeas corpus, and the provision's sponsor recognized that Congressional power to limit judicial review of deportation and exclusion orders was constrained by the Suspension Clause. *See* H.R. Rep. No. 1086 (1961) (discussing interaction of new Section 1105a and "Habeas Corpus Act"); 107 Cong. Rec. 12,179 (1961) (remarks of Rep. Libonati) (describing alien's petition for writ of habeas corpus as "constitutional writ"); 107 Cong. Rec. 12,176 (1961) (remarks of Rep. Walter) ("Nothing contained in the bill is, *or can be*, designed to prevent an alien from obtaining review [of a deportation order] by habeas corpus") (emphasis added); *id.* at 12177 (remarks of Rep. Walter) (Section 1105a preserves habeas for excludable aliens because "[w]e were very much concerned over the possibility of writing an unconstitutional statute by depriving even an alien of the right to a writ of habeas corpus").

2241 habeas action gives aliens with criminal convictions an illogical layer of additional review not available to other aliens. However, the scope of review to which aliens are entitled under Section 2241 will be limited to the narrow inquiry required by habeas corpus. In *Felker*, there was little question that Congress's overall goal was to vest the courts of appeals with a "gatekeeping" function and thus generally to eliminate any further review of successive petitions deemed unmeritorious by the courts of appeals. By finding that it could hear such petitions under Section 2241, but imposing stricter standards for reviewing the successive petitions, the Court avoided profound constitutional questions and remained faithful to the broader legislative purpose. Here also, if review in the court of appeals is foreclosed, preserving Section 2241 will avoid the far-reaching constitutional question of whether the complete denial of a judicial forum is unconstitutional, while also reflecting the purpose of IIRIRA by limiting the scope of review for aliens who are deportable based on a criminal conviction.

CONCLUSION

For the reasons stated, if the Court holds that jurisdiction over petitioners' claims is not available pursuant to 28 U.S.C. 2241, petitioners respectfully submit that the judgment of the court of appeals should be reversed to allow petitioners' claims to be adjudicated in the court of appeals by petitions for review.

Respectfully submitted,

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APPENDIX

Section 1252 of Title 8, United States Code (Supp. V 1999), provides in pertinent part:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

. . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * *

(b) Requirements for review of orders of removal

* * *

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

* * *

(g) Exclusive jurisdiciton

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States . . .
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

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No. 00-1011

In the Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction on direct petitions for review over petitioners' non-constitutional challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

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In the Supreme Court of the United States

No. 00-1011

DEBORIS CALCANO-MARTINEZ, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. ***Statutory Background.*** This case concerns amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by Congress in 1996. Those changes were designed in large part to eliminate the opportunities that criminal aliens had under prior law to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining judicial review of their deportation orders. See generally H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 107-108, 120-123, 157-161 (1996). Two enactments are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. *Pre-1952 Law.* From 1875 to 1917, after a period of unrestricted immigration, Congress enacted a series of laws providing for the exclusion and deportation of certain classes of aliens whose presence in the United States was deemed

contrary to the national interest. See generally William C. Van Vleck, *The Administrative Control of Aliens* 3-16 (1932). At first, exclusion and deportation of aliens within one of those classes was mandatory, and Congress provided administrative officials with very little discretion over the admission of aliens.[1]

In 1917, Congress expanded the classes of excludable aliens, but also gave Executive officials the discretion to admit certain excludable aliens. Van Vleck, *supra*, at 13-14, 34-35. In particular, in the Seventh Proviso to Section 3 of the Immigration Act of 1917 (1917 Act), ch. 29, 39 Stat. 878, Congress provided that, notwithstanding otherwise mandatory grounds of exclusion, an alien returning to an unrelinquished domicile in the United States of seven years after a temporary absence might be admitted "in the discretion of" the responsible official, "under such conditions as he may prescribe." *Ibid.*; see 8 U.S.C. 136(p) (1925). The Proviso's "humane" intent was to "permit the readmission to the United States (under proper safeguards) of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship." S. Rep. No. 352, 64th Cong., 1st Sess. 6 (1916).[2]

The immigration laws from 1891 to 1952 made no express provision for judicial review of exclusion and deportation orders, and indeed indicated an intent to restrict judicial re-

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[1] For example, in the Immigration Act of 1907 (1907 Act), ch. 1134, § 2, 34 Stat. 899, Congress allowed officials to exercise discretion to exclude or admit children under 16 years of age unaccompanied by a parent. See Van Vleck, *supra*, at 10-11. Congress did not provide officials with any explicit authority to suspend *deportation* of an alien until 1940. See *id.* at 134-138; Act of June 28, 1940, ch. 439, § 20, 54 Stat. 672; *INS* v. *Chadha*, 462 U.S. 919, 933 (1983).

[2] The Seventh Proviso was enacted in response to *Lapina* v. *Williams*, 232 U.S. 78 (1914), which held that a statutory ground for exclusion required denial of admission to an alien who was returning to a domicile in the United States after a brief trip abroad, even though that alien would not have been deportable had he not left the United States.

view by providing that all decisions of immigration officers regarding exclusion and deportation would be "final."[3] This Court held, however, that aliens were entitled to limited review of the validity of their deportation and exclusion orders by writ of habeas corpus. See, *e.g.*, *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892) (alien ordered excluded was "entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful"); see also *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953) (holding that, after enactment of Administrative Procedure Act (APA) in 1946, aliens were not entitled to APA review of deportation orders, but could obtain more limited review by habeas corpus).

b. *The 1952 and 1961 Acts.* The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, brought significant changes pertinent here to the Nation's immigration laws. Congress concluded that the Attorney General's discretionary power to admit excludable aliens under the Seventh Proviso had been abused, and that the authority to waive grounds of inadmissibility should be further restricted to cases involving lawful permanent resident aliens. See S. Rep. No. 1515, 81st Cong., 2d Sess. 382-383 (1950); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952). Noting that under then-current law the Attorney General was "empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States," the House Report concluded that "any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations." *Ibid.* Congress thus enacted a new provision authorizing the Attorney General to waive exclusion of such

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[3] See 1917 Act, § 17, 39 Stat. 887; 1907 Act, § 25, 34 Stat. 906-907; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1085.

aliens, Section 1182(c) of Title 8, in substantially the form that it took for 30 years.[4]

Like previous immigration acts, the 1952 INA made no express provision for judicial review of exclusion and deportation orders. In the 1950s, however, this Court held that the enactment of the APA and the INA had significantly altered the legal landscape, and that Congress had authorized the district courts to review the merits of deportation and exclusion orders in actions for declaratory relief brought under the APA, in addition to the more limited review available in habeas corpus proceedings. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956).

In 1961, Congress reacted to those decisions by enacting streamlined provisions for judicial review under the INA. Congress's principal concern was that aliens had resorted "to repeated judicial reviews and appeals for the sole purpose of delaying their justified expulsion from this country." H.R.

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[4] Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms applied only to permit the admission of certain lawful permanent resident aliens who would otherwise be excludable upon returning to the United States, the Board of Immigration Appeals (BIA) ruled in 1956 that the Attorney General was authorized under that provision to grant relief to an alien placed in deportation (rather than exclusion) proceedings who had previously taken a temporary trip abroad and had returned and been admitted to the United States to resume an unrelinquished domicile of seven years. See *In re G.A.*, 7 I. & N. Dec. 274 (B.I.A. 1956). In *Francis* v. *INS*, 532 F.2d 268 (1976), the Second Circuit further ruled, as matter of equal protection, that in light of *In re G.A.*, deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country also had to be given the opportunity to apply for relief from deportation under Section 1182(c). In the interest of national uniformity, the Attorney General acquiesced in that decision. See *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976).

Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). While Congress determined at that time that aliens should be entitled to challenge "the Government's findings of deportability through judicial process," *ibid.*, Congress's "fundamental purpose * * * was to abbreviate the process of judicial review of deportation orders" in order to prevent "forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963).

"The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals." *Foti*, 375 U.S. at 225. To that end, Congress established a self-contained judicial-review provision in the INA, independent and exclusive of the general provisions of the APA. That provision incorporated by reference the procedures for exclusive review of certain orders in the courts of appeals under the Hobbs Administrative Orders Review Act (Hobbs Act), see 28 U.S.C. 2341 *et seq.*, and directed that the Hobbs Act procedures "shall apply to, and shall be the *sole and exclusive procedure for*, the judicial review of all final orders of deportation" under the INA. 8 U.S.C. 1105a(a) (1994) (emphasis added).

Section 1105a(a)'s incorporation of the Hobbs Act procedures was subject to ten express "except[ions]" that adapted for immigration cases the Hobbs Act's general provisions, establishing distinct rules with respect to time limits, venue, and other procedural matters. See 8 U.S.C. 1105a(a) (1994); *Stone* v. *INS*, 514 U.S. 386, 393 (1995). One of those express exceptions addressed habeas corpus. Congress was aware of the concern that a provision for exclusive review in the courts of appeals would divest the district courts of the authority they had previously exercised to review deportation orders by writ of habeas corpus for the benefit of aliens held in custody. See Gov't Br. at 5 & n.2, *INS* v. *St. Cyr* (No. 00-767) (hereinafter *St. Cyr* Gov't Br). Congress therefore

included, among the express exceptions to Section 1105a(a)'s incorporation of the Hobbs Act exclusive court-of-appeals review procedures, a provision that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994). That provision, the committee report explained, "clearly specifie[d] that the right to habeas corpus [was] preserved to an alien in custody under a deportation order. In that fashion, [Congress] except[ed] habeas corpus from the language which elsewhere declare[d] that the procedure prescribed for judicial review in circuit courts shall be exclusive." H.R. Rep. No. 1086, *supra*, at 29.

c. *AEDPA.* On April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to provide that the Attorney General's authority to grant discretionary relief under Section 1182(c) "shall not apply" to a broad class of criminal aliens, including all aliens who were deportable because they had been convicted of an "aggravated felony," as defined by the INA (at 8 U.S.C. 1101(a)(43) (1994 & Supp. V 1999)).[5] See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C.

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[5] In 1990, Congress barred the Attorney General from granting discretionary relief under Section 1182(c) to any alien who was convicted of an aggravated felony offense and had served a term of imprisonment of at least five years for that offense. See Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 5052. AEDPA Section 440(d) extended that bar to any alien convicted of an aggravated felony, regardless of the length of the term of imprisonment. Even before Congress enacted those statutory restrictions on the Attorney General's authority under Section 1182(c), however, the BIA had held that aliens (such as petitioners here) found removable based on a serious crime such as a "serious drug offense, particularly one relating to the trafficking or sale of drugs," would have to demonstrate "unusual or outstanding equities" as a threshold matter in order to be considered for discretionary relief under Section 1182(c). See *In re Buscemi*, 19 I. & N. Dec. 628, 633-634 (B.I.A. 1988); *In re Marin*, 16 I. & N. Dec. 581, 586 (B.I.A. 1978).

1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999))).[6]

Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268. AEDPA therefore left in place the exclusive court-of-appeals review provision that Congress had enacted in 1961, while eliminating the INA's previous express exception to that exclusive

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[6] Congress did not expressly state in AEDPA whether Section 440(d) barred the Attorney General from granting relief under Section 1182(c) to aliens who had already been convicted and whose deportation proceedings were already pending when AEDPA was enacted. On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that AEDPA Section 440(d)'s restriction on the Attorney General's authority applied to all deportation proceedings pending on or after the date of AEDPA's enactment, including those pending proceedings in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241. The courts of appeals divided as to whether (as the government contended) AEDPA had deprived the district courts of habeas corpus jurisdiction to entertain such challenges to final deportation orders. The courts of appeals also reached varying conclusions about the temporal applicability of AEDPA Section 440(d). This Court denied several certiorari petitions raising those issues. See generally Pet. at 4-6, *INS* v. *St. Cyr*, *supra* (No. 00-767).

In light of the Court's denial of certiorari in those cases and the remaining conflict in the circuits on that issue, the Attorney General recently published a final rule that, while not conceding their correctness, acquiesced on a nationwide basis in the rule adopted by those circuits that concluded that AEDPA Section 440(d) does not bar the Attorney General from granting discretionary relief under Section 1182(c) to an alien who had been placed in deportation proceedings before AEDPA was enacted. See 66 Fed. Reg. 6436, 6438 (2001) (promulgating new 8 C.F.R. 3.44). Absent adverse circuit precedent, however, the Attorney General will continue to follow AEDPA Section 440(d)'s restriction on his authority to grant relief under Section 1182(c) in the cases of aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment. See *id.* at 6443-6444.

jurisdiction that "preserved" (H.R. Rep. No. 1086, *supra*, at 29) review by habeas corpus for aliens held in custody. At the same time, Section 440(a) of AEDPA enacted a new Section 1105a(a)(10) to provide, for the same classes of criminal aliens who had been rendered ineligible for relief under Section 1182(c), an exception to the general availability of judicial review of deportation orders in the courts of appeals. AEDPA Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1276-1277.

d. *IIRIRA.* On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-593.[7] An alien convicted of an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999).

Section 304 of IIRIRA also refashioned the terms on which the Attorney General, in his discretion, may grant relief to an alien found to be subject to removal. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C.

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[7] Congress also enacted special forms of removal proceedings for aliens arriving in the United States without valid documentation, see 8 U.S.C. 1225(b)(1) (Supp. V 1999), and for aliens not admitted for lawful permanent residence who are convicted of aggravated felonies, see 8 U.S.C. 1228(b) (Supp. V 1999). Congress expressly provided for limited judicial review in the district courts by habeas corpus of immigration officers' expedited-removal decisions under Section 1225(b)(1). See 8 U.S.C. 1252(e)(2) (Supp. V 1999). For aliens found subject to removal in Section 1228(b) proceedings, Congress provided a modified version of the general court of appeals judicial-review procedures of 8 U.S.C. 1252 (Supp. V 1999) (discussed at pp. 10-11, *infra*), with shortened time limits. See 8 U.S.C. 1228(b) (Supp. V 1999).

1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as "cancellation of removal," with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-594 to 3009-596. As under Section 1182(c) as amended by AEDPA, however, Congress provided that the Attorney General may not grant discretionary relief to an alien who has been convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures and the corresponding repeal of Section 1182(c) along with its replacement by the new provisions for cancellation of removal —all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in old deportation or exclusion proceedings before April 1, 1997, Congress expressly provided that the amendments made by Title III-A of IIRIRA (including IIRIRA Section 304's repeal of former Section 1182(c)) would not apply, and that such cases instead would generally be governed by the pre-IIRIRA provisions of the INA (as amended by AEDPA) as well as by transitional rules further restricting judicial review under 8 U.S.C. 1105a (1994).[8] See IIRIRA § 309(c),

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[8] Congress also provided in IIRIRA that aliens subject to exclusion orders in the transition period would no longer have access to the provision of Section 1105a(b) formerly allowing judicial review of their exclusion orders by habeas corpus (see pp. 4-5, *supra*). Instead, Congress provided that "the action for judicial review" of exclusion orders would be governed by the general provisions, including the transition rules, for judicial review of deportation orders in the courts of appeals under Section 1105a(a). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

110 Stat. 3009-625 (amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction)).

In Section 306 of IIRIRA, Congress recast and streamlined the INA's provisions for judicial review of removal orders. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612; see pp. 5-6, *supra*. In its place, Congress enacted the new 8 U.S.C. 1252 (Supp. V 1999), which provides that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress enacted no general exception to that provision for exclusive review of removal orders in the courts of appeals to allow aliens held in custody under a final order of removal to seek habeas corpus relief, as it had done in the INA before AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994). Instead, Congress included, at 8 U.S.C. 1252(e)(2) (Supp. V 1999), only a much narrower exception that permits a limited form of habeas corpus review for aliens who arrive at the border without valid documentation and were placed in expedited-removal proceedings under 8 U.S.C. 1225(b)(1) (Supp. V 1999).

Congress also specifically restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including aggravated felonies. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting

provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. ***Proceedings Below.***

a. Each petitioner is an alien who was convicted of an aggravated felony offense (specifically, a drug-trafficking crime, see 8 U.S.C. 1101(a)(43)(B) (1994)) before IIRIRA's general effective date of April 1, 1997, and who was placed in removal proceedings and charged with removability based on that aggravated-felony conviction after April 1, 1997. Each petitioner sought in removal proceedings to apply for discretionary relief from deportation under former Section 1182(c). In each case, the Board of Immigration Appeals (BIA) concluded that petitioners were not eligible for discretionary relief from removal, because (a) IIRIRA had repealed Section 1182(c) as of April 1, 1997, and had made relief under that Section unavailable for any alien placed in removal proceedings on or after that date, and (b) aliens such as petitioners who were convicted of aggravated felonies are not eligible to be considered for discretionary relief under IIRIRA's provision for cancellation of removal. See Pet. App. 37a-39a, 48a-49a, 72a-73a.

b. Petitioners filed petitions for review of their final removal orders in the court of appeals. Petitioners contended that they remained eligible for relief from deportation under Section 1182(c) because (they argued) Congress's repeal of that provision should not be applied "retroactively" in their removal proceedings, which were based on

convictions entered before IIRIRA became effective.[9] The court of appeals held that it lacked jurisdiction over the petitions for review because of 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), which precludes judicial review of a final removal order entered against an alien who is removable because of an aggravated felony conviction. Pet. App. 28a-31a, 33a. The court also ruled (*id.* at 21a-28a, 31a-33a), however, that the district court would have authority to review the same challenges to petitioners' removal orders under the general federal habeas corpus statute, 28 U.S.C. 2241.[10]

The court of appeals read *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), to hold that "a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name," Pet. App. 22a, and more particularly that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it," *id.* at 23a. The court found "nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." *Ibid.* And, the court stated, the contrary interpretation would "raise a serious constitutional question under the Suspension Clause" of Article I, Section 9, *id.* at 28a, for it would leave petitioners without a judicial forum for their challenge to the BIA's

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[9] Petitioners also argued that the repeal of Section 1182(c) could not be applied to any criminal *conduct* that occurred before IIRIRA was enacted. See Pet. 17.

[10] Indeed, on the same day, the same panel of the court of appeals ruled in *St. Cyr* v. *INS*, 229 F.3d 406 (2d Cir. 2000), cert. granted, 121 S. Ct. 848 (2001), that the district court had properly exercised habeas corpus jurisdiction under 28 U.S.C. 2241 over such a challenge (see 229 F.3d at 409-410), and that Congress's repeal of Section 1182(c) was not to be applied to an alien who had pleaded guilty to an aggravated felony offense before IIRIRA was enacted (see *id.* at 410-421).

determination that they are ineligible for relief under former Section 1182(c).

The court rejected the government's argument that, even if the district courts could not review the merits of final removal orders by habeas corpus, the courts of appeals would retain sufficient authority to review final removal orders, on direct petitions for review, to satisfy the Constitution. Pet. App. 28a-30a. The government had submitted that, on a petition for review filed by an alien found removable because of an aggravated felony conviction, a court of appeals retains authority to decide issues going to the application of the jurisdictional bar in Section 1252(a)(2)(C) —*i.e.*, whether the petitioner "is an alien who is removable by reason of having committed a specified criminal offense" —as well as substantial constitutional challenges to the final removal order, which Section 1252(a)(2)(C) should not be construed to preclude. Even assuming that such review remains available in the court of appeals, the court suggested that it would be insufficient to satisfy the Constitution, for, the court stated, "review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law." *Id.* at 30a.

Finally, the court observed that, "if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review," for such a scheme "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review." Pet. App. 32a. But, the court stated (*ibid.*), "[a]lthough this interpretation may represent sound legislative policy, * * * we do not read IIRIRA or our prior cases to permit such review under" Section 1252(a)(2)(C).

SUMMARY OF ARGUMENT

I. A. Congress has precluded all judicial review of petitioners' contention that they are eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994). Petitioners were properly found removable based on their convictions for aggravated-felony offenses. Accordingly, although removal orders are generally subject to review exclusively by petition for review in the court of appeals, under 8 U.S.C. 1252(a) (Supp. V 1999), such review of petitioners' contentions is precluded by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), which provides that no court may review a removal order entered against an alien who is removable because of an aggravated-felony conviction. The text and legislative history of Section 1252(a)(2)(C) make clear that Congress intended to preclude petitions for review by aggravated felons to the maximum extent possible. Congress did not bar the courts of appeals from ensuring that the alien subject to the removal order is in fact an alien and is removable because of an aggravated-felony conviction, but those matters are undisputed here. Congress also did not bar the courts of appeals from considering substantial constitutional challenges to aggravated felons' removal orders, but no such challenge is presented here.

B. Congress has also precluded the district courts from reviewing challenges to aggravated felons' removal orders by habeas corpus or otherwise. Congress's unmistakable intent in the judicial-review provisions of the Immigration and Nationality Act is to channel all challenges to removal orders into the courts of appeals (subject to a narrow express exception not implicated in this case). The court of appeals' ruling that petitioners' challenges could proceed in district court cannot be reconciled with the streamlined legislative scheme for judicial review of removal orders that Congress has enacted. It also ignores the history underlying congressional efforts to minimize judicial involvement in

removal proceedings, including Congress's repeal of a provision of the INA that had previously preserved district court review by habeas corpus of deportation orders for aliens actually held in custody.

II. A. Congress's preclusion of review of petitioners' claims does not violate the Suspension Clause of Article I, Section 9, the Due Process Clause, or Article III. The constitutional guarantee of habeas corpus in the Suspension Clause does not extend to judicial review of claims that an alien is eligible for discretionary relief from deportation. This Nation's immigration laws have traditionally treated such discretionary relief as a matter of grace and not of right, and have fashioned laws to grant such relief as creations of power in the Attorney General, not vesting of rights in the individual alien. And while English common law courts before 1789 did review on habeas corpus contentions that a custodian had no legal authority to detain a petitioner, that review did not extend to contentions that the custodian, although vested with legal authority over the petitioner, nonetheless should exercise his discretion to dispense with the petitioner's custody and detention.

Nor do this Court's decisions establish that such review is required by the Suspension Clause. Petitioners rely on the fact that this Court stated that, under pre-1952 immigration law, Congress had reduced judicial review to the minimum scope permissible under the Constitution, and yet during that period the Court also considered on habeas corpus proceedings claims that the Attorney General had failed properly to exercise his discretion to consider applications for discretionary relief from deportation. But the Court did not hold that the writ of habeas corpus required review of such contentions, nor did it hold that the Suspension Clause required that such review be available as a constitutional matter. Such a holding, moreover, would have been a considerable extension of the writ from its common law scope preserved by the Suspension Clause, and the Court's habeas

corpus decisions under pre-1952 law were under a habeas corpus statute that was and is much broader than the common law writ. Moreover, the kinds of challenges to exclusion and deportation orders that the Court did state were reviewable by habeas corpus—claims that the person subject to the order is not an alien or is not removable, that the removal proceedings were wanting in due process, or that the removal order was totally lacking in evidentiary foundation—may still be raised on petition for review.

B. Judicial review of petitioners' claims is not required by the Due Process Clause. Although removal proceedings themselves must be fundamentally fair to satisfy the Due Process Clause, absent a contention that a removal proceeding was not fundamentally fair, due process does not require judicial supervision of removal orders. While due process may require judicial review of the outcome of an administrative proceeding when that proceeding itself was not consistent with the fundamental requirements of due process, that is not the case here. Due process prerequisites to imprisonment are also inapposite to immigration proceedings, given the significant difference between the two sanctions.

Nor does Congress's preclusion of judicial review of petitioners' claims contravene Article III's vesting of the judicial power of the United States in the federal judiciary. Congress may assign controversies between the government and private individuals over public rights to an administrative adjudicator without review by an Article III court. The right of an alien to enter or remain in the United States is plainly such a public right.

III. If the Court concludes that judicial review of petitioners' claims is required by the Constitution, then that review should proceed in the court of appeals, not the district court. Review in the court of appeals would be much more consistent with Congress's intent in the judicial-review provisions of the INA since 1961, which is to minimize delays

in deportations and to streamline judicial review by channeling removal cases into the courts of appeals. Congress has long acted on the understanding that district court review of removal orders presents a significant danger of unwarranted delay in the execution of removal orders. That understanding was reinforced in 1996 when Congress enacted 8 U.S.C. 1252(b)(9) (Supp. V 1999), which expressly requires that all questions of law and fact arising out of removal proceedings be heard only in the courts of appeals on petition for review. Section 1252(b)(9) therefore precludes district court review, even if some judicial review is required by the Constitution.

ARGUMENT

I. CONGRESS HAS PRECLUDED JUDICIAL REVIEW OF PETITIONERS' NON-CONSTITUTIONAL CHALLENGES TO THEIR REMOVAL ORDERS

Congress's comprehensive revision of the INA's judicial-review provisions in IIRIRA resulted from its concern that pre-IIRIRA law had been ineffective in securing the prompt deportation of criminal aliens. See generally H.R. Rep. No. 469, *supra*, Pt. 1, at 118-126. Congress adopted a two-pronged approach to prevent delays in the removal of criminal aliens after completion of the administrative proceedings. First, Congress dramatically restricted the authority of the courts of appeals to review removal orders entered against aggravated felons and other criminal aliens. The courts of appeals' authority with respect to such aliens extends only to ensuring that the person seeking review indeed falls within a class of removable aliens and that the alien's removal proceeding was consistent with the Constitution. Second, Congress completely eliminated the district courts' authority to review any removal orders on habeas corpus. The result is that Congress has allowed aliens found removable because of an aggravated felony conviction to pursue one, limited opportunity for judicial review of the removal order, and

only in the court of appeals. The scope of that limited review does not extend to petitioners' non-constitutional challenge to the BIA's conclusion that the Attorney General may not grant them discretionary relief under former Section 1182(c).

That result is precisely what Congress intended. When Congress enacted IIRIRA's permanent provisions, it simultaneously restricted judicial review for the specified classes of criminal aliens *and* unambiguously barred the Attorney General from granting discretionary relief to those very same aliens by repealing the former Section 1182(c) and excluding them from eligibility for cancellation of removal under the new 8 U.S.C. 1229b (Supp. V 1999). See *St. Cyr* Gov't Br. 32-49. Those two measures were part of a single, comprehensive package of provisions in IIRIRA that were designed to speed the removal of criminal aliens. Congress would have seen no need whatsoever to preserve an avenue for those aliens to obtain judicial review under IIRIRA of a statutory question concerning their eligibility for discretionary relief because Congress itself had supplied the answer to that very question in other provisions of IIRIRA.

A. In Section 1252(a)(2)(C) Of Title 8, Congress Has Precluded Judicial Review Of Petitioners' Challenges In The Court Of Appeals

1. In Section 1252, as added to the INA by IIRIRA, Congress carried forward the pre-IIRIRA rule that final orders of removal are subject to judicial review only in the courts of appeals pursuant to the Hobbs Act's exclusive-review procedures, except as specifically provided otherwise. See p. 10, *supra*. In Section 1252(a)(2), Congress also enacted stringent limitations on the scope of review that the courts of appeals may exercise over such removal orders. Congress provided, for example, that "no court shall have jurisdiction to review" any decision of the Attorney General specified by the INA to be within his discretion (excepting decisions regarding asylum). See 8 U.S.C. 1252(a)(2)(B)

(Supp. V 1999). Similarly, and pertinent here, Congress provided:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section * * * 1227(a)(2)(A)(iii), (B), (C), or (D) of this title[.]

8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). That provision directly covers petitioners' cases. They were each found removable by reason of having committed a criminal offense "covered in" Section 1227(a)(2)(A)(iii), the INA provision making removable any alien convicted of an aggravated felony.

The legislative history of Section 1252(a)(2)(C) makes abundantly clear that Congress intended to cut off, to the maximum extent possible, judicial review for aliens found removable because of an aggravated felony conviction. Section 1252(a)(2)(C) originated in an amendment to a pending immigration bill offered by Senator Abraham at a markup session on March 14, 1996. At that session, Senator Abraham first stated that, under then-current law, aliens found deportable based on a criminal conviction could delay their deportation by "go[ing] back into the court system and * * * hav[ing] those final adjudications by the Board of Immigration Appeals reviewed throughout the entire judicial process." Sen. Judiciary Comm. Tr. of Proceedings 19 (Mar. 14, 1996) (lodged with the Clerk). Senator Abraham then explained the effect of his amendment as follows:

> What we propose in this amendment is to end the process following the appeal to the Board of Immigration Appeals. The Board obviously is specialized in this area. It understands, and we believe, we have full confidence it will protect and balance properly the rights of the deportable alien. And we believe that by ending the appeal process at that point we will make it more feasible for

> the Department of Justice to deport those criminal aliens who otherwise go back into society, commit additional crimes, end up back in the prison system, and in our judgment really should instead be replaced by people who want to be in this country and play by the rules.

Id. at 19-20. In response to an objection by Senator Kennedy that, under the amendment, "the right to appeal is eliminated altogether," *id.* at 21, Senator Abraham stated:

> There has been plenty of review. There has been full review of the entire criminal proceeding and the entire criminal case afforded to the non-citizen who has violated the law. That whole process is reviewable. And once that conviction is upheld, the criminal alien becomes deportable. The only thing—there are very few issues left then to be determined. Simply a deportation hearing determines, Is this the person who committed the crimes? Is there some sort of valid basis to conclude otherwise? There is a process for that.
>
> The notion of tying up the court system and protracting the process and permitting criminal aliens to stay, in my judgment, is one of the real serious problems we have right now.

Id. at 23.[11] In response to questions from Senators Simpson and Hatch as to whether, once the final order of deportation was entered, "there would be no further review," Senator Abraham stated, "That is right." *Id.* at 24. The Committee adopted the Abraham amendment by a 12-6 vote. *Id.* at 28.

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[11] Senator Abraham's explanation that judicial review is unnecessary because there will be very little to be decided in the administrative removal proceedings concerning an alien who had been convicted of an aggravated felony confirms the understanding that such an alien would be ineligible for discretionary relief from removal and therefore would not be in a position to interject issues concerning such relief into the proceedings.

See also S. Rep. No. 249, 104th Cong., 2d Sess. 14, 27-28 (1996); *id.* at 40 (additional views of Sen. Abraham).

On the Senate floor, Senator Abraham explained the effect of his amendment in sweeping terms:

> In short, once the criminal alien had exhausted all appeals available under the criminal laws, the criminal alien would still have the full deportation administrative provisions to protect him, that is, a deportation hearing and the ability to appeal any order of deportation to the Board of Immigration Appeals, but that would end the process as opposed to triggering a return to the court system. That will be positive because it will mean the actual deportation of more criminal aliens and the freeing up of the court system from many of these frivolous lawsuits.
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> * * * * *
>
> These reforms would not affect any of the aliens' due process protections on the underlying criminal offense. Aliens would still be entitled to the lengthy appellate and habeas corpus review, just like U.S. citizens. But abuses of the appeals process would stop there and not continue on through the deportation provisions themselves.

142 Cong. Rec. 7349 (1996).[12]

2. Especially in light of Senator Abraham's explanations of the effect of his amendment, the only reasonable construction of Section 1252(a)(2)(C) is that it prohibits the courts from reviewing challenges to removal orders entered against

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[12] See also 142 Cong. Rec. at 10,052 (statement of Sen. Abraham, explaining that his amendment would "end judicial review for orders of deportation entered against these criminal aliens," but noting that he would have preferred an even more sweeping provision that would have eliminated appeals to the BIA, because "[w]hile we have eliminated judicial review for orders of deportation entered against most criminal aliens, we have not eliminated their capacity to request repetitive administrative review of the deportation order").

aliens convicted of aggravated felonies. Even so, Section 1252(a)(2)(C) does not operate to preclude *all* judicial consideration of issues raised by removal orders entered against such aliens. The preclusion of judicial review in Section 1252(a)(2)(C) operates only when the person seeking to invoke the jurisdiction of the courts is "an alien who is removable by reason of having committed a criminal offense covered in" various sections of the INA—such as Section 1227(a)(2)(A)(iii) (making deportable aliens convicted of aggravated felonies) and Section 1227(a)(2)(B) (making deportable aliens convicted of controlled-substance offenses). Thus, as a precondition to concluding that it lacks jurisdiction over a petition for review, the court of appeals must determine whether (a) the person seeking to invoke the jurisdiction of the courts actually is an alien, (b) the alien is removable, and (c) the ground of removal is one that precludes judicial review under the statute—*i.e.*, whether the basis of the alien's removal is one of the specified classes of criminal offenses, such as an aggravated felony or a controlled-substance offense, that triggers the preclusion of judicial review.

The court of appeals' determination whether it has jurisdiction over the case (*i.e.*, whether its jurisdiction has been precluded by Section 1252(a)(2)(C)) may require it to rule on issues that also go to the underlying merits of the removal order entered against the alien. Under well-settled principles governing preclusion-of-review provisions, however, when the availability of judicial review depends on a particular factual or legal conclusion, a court may determine whether that condition exists. The doctrine that a court has "jurisdiction to determine its jurisdiction," even when to do so requires it to render a decision that bears on the underlying merits, rests on that understanding. See *Land* v. *Dollar*, 330 U.S. 731, 739 (1947).

Thus, for example, if the BIA concluded that an alien is removable because he was convicted of an aggravated felony

or a controlled-substance offense, but the court of appeals then concludes that the offense of which the alien was convicted does not fall within the INA's statutory definition of an aggravated felony or a controlled-substance offense, then the court of appeals' jurisdiction over the case is not precluded by Section 1252(a)(2)(C). The court may proceed to review the removal order on the merits and may vacate the order if it determines that the alien is not actually removable or that the order is defective for some other reason. See *Ye* v. *INS*, 214 F.3d 1128 (9th Cir. 2000); *Solorzano-Patlan* v. *INS*, 207 F.3d 869 (7th Cir. 2000); see also *Richardson* v. *Reno*, 180 F.3d 1311, 1316 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000). Similarly, if the person seeking review of his removal order argues that he is actually a citizen, the court of appeals has jurisdiction to resolve that threshold issue. See *Nguyen* v. *INS*, 208 F.3d 528, 531 (5th Cir.), cert. granted, 121 S. Ct. 29 (2000).

In addition, we do not understand Section 1252(a)(2)(C) as precluding a court of appeals from reviewing substantial constitutional challenges to an alien's removal order, even if the BIA has found the alien to be removable based on a criminal conviction referred to in that Section. Although the preclusion of review in Section 1252(a)(2)(C) has a broad reach, we believe it is appropriate to interpret it in light of this Court's jurisprudence directing that Acts of Congress should not be construed to preclude review of constitutional claims absent a clear congressional expression to that effect. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 366-374 (1974). Notwithstanding Section 1252(a)(2)(C)'s categorical language, neither the text nor the legislative history of that provision adverts specifically to preclusion of review of constitutional claims, and so the courts of appeals retain authority to consider such claims. Thus, a court of appeals would not be precluded from reviewing an alien's contention that a provision of the INA defining a particular offense as an

"aggravated felony," or rendering the alien removable based on a conviction for that offense, is unconstitutional. Nor, in our view, would the court of appeals be precluded from reviewing a substantial contention that the immigration judge (IJ) or the BIA had not observed fundamental guarantees of due process before concluding that the alien was removable based on a conviction for such an offense. See *Singh* v. *Reno*, 182 F.3d 504, 509-510 (7th Cir. 1999); *Richardson*, 180 F.3d at 1316 n.5.

3. Petitioners' challenges to their removal orders at issue here do not fall within the limited scope of authority to review removal orders entered against criminal aliens that the courts of appeals retain after IIRIRA. Petitioners do not contest the BIA's conclusions that they are aliens who are removable based on a conviction for a criminal offense that triggers the preclusion of review in Section 1252(a)(2)(C). They do not challenge the constitutionality of the statutory provisions, 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i) (Supp. V 1999), that render them removable for having been convicted of an aggravated felony or controlled-substance offense. They do not contend that the administrative proceedings before the IJ and the BIA that resulted in the entry of final removal orders against them were fundamentally unfair. And they have not argued in this Court that Congress was prohibited by the Constitution from rendering them ineligible for discretionary relief from removal, and any such contention would be baseless, in light of a long line of decisions of this Court holding that Congress's power to alter the basis on which an alien may be deported is not constrained by the Constitution's limitations on retroactive lawmaking.[13] *A fortiori*, no substantial constitutional claim

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[13] See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (upholding deportation under 1952 INA of alien convicted in 1938 of marijuana violation); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954) (upholding application of 1950 statute requiring deportation of anyone who had ever been a member of the Communist Party after entering the United States to an alien who

could arise here, given that petitioners were clearly deportable when they committed, pleaded guilty to, and were convicted of, their offenses, and the only change in the law that they resist is IIRIRA's repeal of Section 1182(c), which withdrew from the Attorney General the authority to grant them *discretionary relief* from deportation.

In sum, petitioners are aliens; they are removable; and their removal orders are based on convictions for aggravated felonies. The court of appeals therefore properly concluded that Section 1252(a)(2)(C) divested it of jurisdiction to review petitioners' challenges to their removal orders on petition for review.

B. Congress Has Also Divested The District Courts Of Authority To Review The Merits Of Petitioners' Removal Orders

Although the court of appeals ruled that it could not entertain petitioners' non-constitutional challenges to their removal orders on direct petitions for review, it also held that Congress had not divested the district court of its authority to review such a challenge under its general habeas corpus jurisdiction. Indeed, in the companion case of *St. Cyr* v. *INS*, 229 F.3d 406, 409-410 (2d Cir. 2000), cert. granted, 121 S. Ct. 848 (2001), the court of appeals ruled that the district court had properly exercised its habeas corpus jurisdiction to review such a challenge. As we have explained in our brief (at 18-27) for the petitioner in *St. Cyr*, that ruling is in error. The court's conclusion that aliens may challenge their removal orders in district court is contrary to Congress's unmistakable design of the judicial-review provisions of the INA, which is to channel all

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had been a Communist only before the statute's enactment); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596 (1952) (similarly upholding application of 1940 statute requiring deportation of any person who had been a member of the Communist Party, even in the past); *Mahler* v. *Eby*, 264 U.S. 32, 34, 39 (1924) (upholding deportation under 1920 statute of alien convicted in 1918 under the Espionage Act); see also *St. Cyr* Gov't Br. 39-41.

challenges to removal orders into the courts of appeals. In Section 401(e) of AEDPA (see *id.* at 19) and in the new judicial-review provisions enacted in IIRIRA (see *id.* at 19-21), Congress eliminated the district courts' authority to review final removal orders on habeas corpus, and required that such review be had, if at all, only in the courts of appeals on petition for review—subject only to one express and very narrow exception (which is inapplicable here) for aliens without documentation who are stopped at the border and placed in expedited-removal proceedings there (see *id.* at 20). We refer the Court to the discussion of that issue in our brief in *St. Cyr*, and add the following points:

1. Petitioners argue (Br. 17) that Section 1252(a)(2)(C) by its terms restricts only "judicial review" of aggravated felons' removal orders and need not be read also to prevent the courts from reviewing those removal orders by "habeas corpus," which, petitioners maintain, is a concept entirely separate from that of "judicial review." That argument ignores the text of Section 1252(a)(2)(C) itself as well as the text and structure of both Section 1252 as a whole and its predecessor, 8 U.S.C. 1105a(a) (1994).

As an initial matter, the preclusion of review in Section 1252(a)(2)(C) does not even use the term—"judicial review" —that petitioners insist is a term of art that implicitly excludes habeas corpus. Rather it provides broadly that "no court shall have jurisdiction to review" a removal order entered against an alien who is removable by reason of having committed one of the specified criminal offenses. Section 1252(a)(2)(C) thus prohibits any court (not just the court of appeals) from reviewing in any manner (not only by "judicial review") removal orders entered against aggravated felons. See *St. Cyr* Gov't Br. 26-27.

In any event, petitioners' argument that Congress used the term "judicial review" in a manner that excludes habeas corpus is refuted by numerous features of Section 1252 and its predecessor. Section 1252(a)(2)(C) is placed within Sec-

tion 1252(a), which provides (at Section 1252(a)(1)) that "[j]udicial review of a final order of removal * * * is governed only" by the procedures of the Hobbs Act, which require such review to proceed in the courts of appeals. As we explain in our brief (at 25-27) in *St. Cyr*, that incorporation of the Hobbs Act's exclusive-review provisions for "judicial review" of administrative orders necessarily precludes district court review of removal orders, by habeas corpus or otherwise. The INA, at least since 1961, has consistently treated "habeas corpus" as one of the forms of "judicial review" of removal orders that might be available.[14] Accordingly, in light of Congress's consistent usage in the immigration laws, a categorical prohibition in the INA against "judicial review" of removal orders against aggravated felons necessarily encompasses a prohibition against review of such orders by habeas corpus.

Petitioners' reliance (Br. 20-22) on *Heikkila* v. *Barber*, 345 U.S. 229 (1953), to establish that "judicial review," as used in IIRIRA's amendments to the INA, does not include habeas corpus is wide of the mark. In *Heikkila*, the Court held that a challenge to a deportation order could not proceed under the APA, in light of Section 10 of the APA (now codified at 5 U.S.C. 701(a)(1)), which established an exception to the APA's general right of review when "statute[s] preclude[] judicial review." The statute that the Court held to preclude judicial review was Section 19(a) of the Immigration Act of 1917, which made the decision of the Attorney General

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[14] In 1961, for example, Congress provided that "any alien held in custody pursuant to an order of deportation may obtain *judicial review* thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994) (emphasis added); see also 8 U.S.C. 1105a(b) (1994) (alien subject to a final order of exclusion "may obtain *judicial review* of such order by habeas corpus proceedings and not otherwise") (emphasis added). In IIRIRA itself, Congress provided that one narrow class of aliens, those placed in expedited-removal proceedings at the border, could obtain "judicial review" of their removal orders in habeas corpus proceedings. 8 U.S.C. 1252(e)(2)(Supp. V 1999). See *St. Cyr* Gov't Br. 25-27.

"final" as to deportation orders and had been held to bar judicial examination of the validity of a deportation order except by habeas corpus. 345 U.S. at 231-236. The Court concluded that the 1917 Act did indeed "preclud[e] judicial review," within the meaning of Section 10 of the APA, even though some judicial testing of the validity of the deportation order remained available on habeas corpus and so "the finality of [the] administrative decision [was not] absolute." *Id.* at 235-236.

Heikkila held that a total bar to judicial scrutiny of an administrative order was not necessary to find a "preclu[sion]" of judicial review under the APA. And *Heikkila* did assume that, in determining whether a statute "preclud[es] judicial review," within the meaning of the APA, Congress meant the courts to compare the scope of review that remains available under a statute that allows only limited scrutiny to the full scope of "judicial review" that would otherwise be available under the APA.[15] But it does not follow that every time that Congress uses the term "judicial review," it necessarily excludes habeas corpus from its scope.

As we have explained (pp. 5-6, 27, *supra*), Congress in 1961 enacted a self-contained mechanism for judicial review of deportation orders that specifically included habeas corpus in some circumstances and expressly identified such access to habeas corpus in those circumstances as "judicial review." Moreover, Congress understood the 1961 amendments to the INA, including the provisions for habeas corpus review, to "implement[] and appl[y]" Section 10 of the APA, which provided that "[t]he form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by

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[15] See *Heikkila*, 345 U.S. at 236 ("To review those requirements under the Constitution, whatever the intermediate formulation of their constituents, is very different from applying a statutory standard of review, *e.g.*, deciding 'on the whole record' whether there is substantial evidence to support administrative findings of fact under § 10(e).").

statute." See H.R. Rep. No. 1086, *supra*, at 11, 27. Indeed, Section 10 of the APA, now codified at 5 U.S.C. 703, also provided that the form of proceeding for "judicial review" under the APA may be any applicable form of legal action, including "actions for * * * writs of * * * habeas corpus."[16]

Thus, when Congress provided in Section 1252(a)(1) that "[j]udicial review of a final order of removal" shall be had only in the court of appeals, see 8 U.S.C. 1252(a)(1) (Supp. V 1999), it precluded district court review of removal orders by habeas corpus. That conclusion is confirmed by 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides that "[j]udicial review of *all* questions of law and fact, including interpretation and application of * * * statutory provisions" arising out of a removal order, "shall be available *only*" in a proceeding for review brought in the court of appeals under Section 1252 itself. (Emphasis added.) Section 1252(b)(9) therefore necessarily precludes a district court on habeas corpus from reviewing the questions of law petitioners seek to raise here regarding the application of former Section 1182(c) to their cases. And when Congress further provided in Section 1252(a)(2)(C) that, "[n]otwithstanding any other provision of law," "no court" shall "review" removal orders entered against aggravated felons, it barred such review by both the courts of appeals, on petitions for review under Section 1252 itself, *and* the district courts, whether on habeas corpus under 28 U.S.C. 2241 or otherwise.

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[16] Indeed, Congress made clear that Section 1105a was intended to create "a single, separate, statutory form of judicial review of administrative orders for the deportation *and exclusion* of aliens from the United States." H.R. Rep. No. 1086, *supra*, at 22 (emphasis added). The reference to "exclusion" of aliens is significant, because, as explained above (p. 27 note 14, *supra*), the 1961 amendments to the INA provided that "judicial review" of exclusion orders should proceed *only* by habeas corpus. Congress thus plainly understood habeas corpus review of exclusion orders to be a form of "judicial review of administrative orders."

2. Relying on *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), petitioners further argue (Br. 17-18) that, to divest the district courts of their authority to review a deportation order by habeas corpus, Congress must expressly mention "habeas corpus" (or perhaps 28 U.S.C. 2241), and that Congress did not do so in IIRIRA. In fact, however, Congress *did* expressly mention habeas corpus in IIRIRA. In Section 1252, Congress authorized the district courts to review removal orders by habeas corpus, but only in the case of aliens who are stopped at the border without documentation and placed in expedited-removal proceedings under 8 U.S.C. 1225(b)(1) (Supp. V 1999). See p. 8 note 7, p. 24 note 27, *supra*. Congress thus specified exactly the kinds of removal orders that may be reviewed by habeas corpus, and necessarily precluded review of any other removal orders by the same means.

Moreover, neither *Felker* nor *Yerger* holds that Congress must use the words "habeas corpus" or "Section 2241" to preclude review by those means, when such preclusion of review is the unmistakable conclusion that must be drawn from Congress's statutory scheme. *Felker* and *Yerger* held that, when Congress specifically divested this Court of its *appellate* jurisdiction to review habeas corpus proceedings but did not expressly address (either by explicit mention of habeas corpus or in categorical terms that included habeas corpus) the Court's *original* jurisdiction to entertain habeas corpus petitions—which jurisdiction was based in a separate statutory provision—the Court would not read the restriction in the former statutory source of jurisdiction to reach over into the latter by implication. See *Felker*, 518 U.S. at 660-661 (explaining that this Court's original and appellate jurisdiction in habeas corpus matters are based in different statutes). In IIRIRA, by contrast, Congress has placed *all* of the courts' authority to review removal orders in one place, Section 1252, and has made clear as a categorical matter in that very same place that all such review must

proceed only in the courts of appeals, except as otherwise provided in Section 1252 itself. See pp. 10-11, *supra*. The necessary conclusion from that categorical preclusion is that a district court may not review the merits of a final order of removal, whether by habeas corpus or otherwise.

II. THE PRECLUSION OF REVIEW OF PETITIONERS' CHALLENGES TO THEIR REMOVAL ORDERS IS CONSTITUTIONAL

Petitioners argue (Br. 22-42) that the Constitution requires a judicial forum for their contention that the Attorney General may grant them discretionary relief from deportation under former Section 1182(c). In particular, they contend that a congressional preclusion of judicial review of that question would violate the Suspension of Habeas Corpus Clause of Article I, Section 9, the Due Process Clause of the Fifth Amendment, and Article III. Those contentions are without merit. As we now show, the Constitution does not prohibit Congress from committing to the Attorney General the authority to determine whether, as a categorical matter, certain classes of aliens should be eligible for discretionary relief from deportation.

A. Preclusion Of Judicial Review Of A Non-Constitutional Claim That The Attorney General Has And Should Exercise Discretion To Waive Deportation Is Not A Suspension Of Habeas Corpus

1. Petitioners place primary reliance (Br. 29-34) on the Suspension Clause, which, they contend, requires the availability of judicial review of any statutory as well as constitutional issue arising in connection with an alien's removal from the United States. Petitioners argue (*ibid.*) that, at English common law before 1789, the writ of habeas corpus was available to review the legality of an individual's detention. Accordingly, they contend, a provision that deprives the courts of authority to adjudicate a statutory question bearing on the deprivation of an alien's liberty would con-

stitute a "suspen[sion]" of the "Privilege of the Writ of Habeas Corpus," in violation of Article I, Section 9.

The fundamental flaw in that argument is that petitioners are unquestionably removable based on their aggravated-felony convictions and are seeking the exercise of the Attorney General's power to grant discretionary relief from deportation. Indeed, this Court has described the Attorney General's discretionary power to grant a dispensation from deportation as "an act of grace" accorded to his "unfettered discretion," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996); see also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.). Moreover, although in this case the BIA determined as a matter of statutory construction that these petitioners were ineligible for relief under Section 1182(c), the Attorney General (or the BIA) could also have exercised discretion to determine as a matter of policy that—in light of Congress's increasingly restrictive treatment of aliens convicted of aggravated felonies and its preclusion of cancellation of removal for such aliens in IIRIRA—no alien who was convicted of such an aggravated felony should receive relief under Section 1182(c), whether or not he was theoretically eligible for such relief under that statute.[17]

In addition, as we have explained in our brief (at 43-45) in *St. Cyr*, the language and history of former Section 1182(c) make clear that Congress framed that provision, not as a "right" on the part of the alien to seek or obtain relief from deportation, but rather as an authorization to the Attorney General to grant such dispensation when he believed it was

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[17] See *Yang*, 519 U.S. at 31 (statutory eligibility for discretionary relief from deportation "in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace").

justified by the alien's circumstances. Section 1182(c) provided that certain lawful permanent resident aliens "may be admitted in the discretion of the Attorney General" without regard to various provisions of Section 1182(a) that render an alien excludable and therefore require the Attorney General to deny admission to such an alien. The predecessor to Section 1182(c), the Seventh Proviso to Section 3 of the 1917 Act, was similarly framed in terms of the immigration authorities' discretion to waive exclusion of aliens in light of humanitarian circumstances. See p. 2, *supra*. Absent from the background and legislative history of Section 1182(c) and its predecessor is any indication that Congress intended therein to create a "right" in the alien to be considered for relief from deportation.

Thus, this is not a case in which the courts are called upon to determine whether the Attorney General has *no authority* to detain an individual—the paradigm of the cases in which English common law courts granted habeas corpus. See pp. 33-34, *infra*. The Attorney General unquestionably has legal authority to detain and remove petitioners, for they have been properly found to be removable under standards set forth in congressional enactments.

2. A review of English common law cases does not support a conclusion that a writ of habeas corpus would issue in the circumstance where, as in this case, an official had statutory authorization to detain the individual seeking relief but that individual contended that the official was not properly exercising his discretionary power to determine whether the individual should be released. Analyses of the common law origins of the writ of habeas corpus vary considerably in their treatments of that subject, but most writers agree that the writ acquired its classic form in the 17th century, during the struggle for power between Charles I and Parliament. Before that time, common law courts had used the writ principally to protect their jurisdiction against incursions from other courts, and would not issue the writ

when the return showed that the petitioner was confined by order of the monarch or the Privy Council.[18] After *Darnel's Case* (1627), 3 State Trials 1 (1816), in which the Court of King's Bench declined to issue the writ when the return showed that the prisoner was held by special command of the monarch, Parliament proposed and Charles I accepted the Petition of Right, which abolished the monarch's power to imprison by special command without showing cause.[19] And following *Chambers's Case*, 79 Eng. Rep. 746 (K.B. 1629), in which the King's Bench declined to issue the writ for the benefit of a prisoner committed by the Star Chamber on the ground that the Star Chamber was itself a high court of justice, Parliament passed the Habeas Corpus Act of 1641, which abolished the Star Chamber and set forth the basic principles for issuance of the writ. The 1641 Act provided that, when an individual detained by order of the monarch or Privy Council sought the writ of habeas corpus, the custodian was required by return to "certify the true cause of such * * * imprisonment, and thereupon the court * * * shall proceed to examine and determine whether the cause of such commitment appearing upon the return be just and legal, or not."[20]

The 1641 Act only established, however, that common law courts could require a custodian to demonstrate that he had

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[18] See William F. Duker, *A Constitutional History of Habeas Corpus* 33-43 (1980); 9 W.S. Holdsworth, *A History of English Law* 112-113 (1926); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2521 (1998); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966); Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 47-76 (1960).

[19] See Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 Can. B. Rev. 10, 38-40 (1940); Duker, *supra*, at 45; R.J. Sharpe, *The Law of Habeas Corpus* 9-13 (1976).

[20] Duker, *supra*, at 47 (quoting 1641 Act); see also *Developments in the Law--Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1044 (1970); 9 Holdsworth, *supra*, at 115; Sharpe, *supra*, at 15.

some basis in law to hold the detained person.[21] The 1641 Act did not provide, and English decisions before 1789 did not hold, that the writ would issue on an allegation that officials were improperly exercising or declining to exercise their discretion to waive or dispense with their legal authority to detain the prisoner. Although it has been suggested that common law courts would issue the writ on a showing of abuse of official discretion, see Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2524, 2530, 2534 (1998), the evidence cited for that suggestion is quite thin.[22]

For example, in *Hetley* v. *Boyer*, 79 Eng. Rep. 287 (K.B. 1613), in which the King's Bench ordered the release of a prisoner who had been confined by the Commissioners of Sewers, apparently in retaliation for his having previously brought a successful action challenging the commissioners' assessment, the court ordered Hetley's release on the

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[21] See 1 William Blackstone, *Commentaries on the Laws of England* 132-133 (1765) (facsimile ed. 1979) ("To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*."); 9 Holdsworth, *supra*, at 120 (noting that, during House of Lords' examination of habeas corpus in 1758, the judges informed the Lords that on habeas corpus the court was "concerned, not with the truth of the return, but with its sufficiency in point of law to justify a detention"); *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 42 (1758) (Wilmot, J., advising the House of Lords that a prisoner would not be discharged "in case the facts averred in the return to a writ of habeas corpus, are sufficient in point of law to justify the restraint"); Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. Chi. L. Rev. 243, 244-245 (1965) ("At common law * * * the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges.").

[22] Petitioners specifically do not argue that discretionary determinations must be subject to review on habeas corpus (see Br. 24-25), and 8 U.S.C. 1252(a)(2)(B) (Supp. V 1999) expressly forecloses all judicial review of most such actions.

ground that that confinement was unjustified and was "in direct opposition to the authority and judgment of this Court" in the prior action. *Id.* at 287. Although the court reiterated its finding in the prior action that the *assessment* was invalid because it was intended to punish one person in the village, it did not issue the writ because the *confinement* was an abuse of discretion, but rather because it defied the court's prior judgment.

In *Ex parte Boggin*, 104 Eng. Rep. 484 (K.B. 1811), in which the legality of a sailor's impressment was at issue, the court referred in a footnote to a prior case before the court, involving one Chalacombe, in which the petitioner had contended that he had been impressed in contravention of Admiralty policy against impressment of persons in the coal and coasting trades. *Id.* at 484 n.(a)2. The Admiralty in Chalacombe's case argued that the writ should not issue because the Admiralty's policy not to impress such persons was a matter of "grace and favour," and not of right. Although the court directed the Admiralty to state its justification for its confinement of Chalacombe in a return to the writ, Lord Chief Justice Ellenborough also observed that, "[c]onsidering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter ought to be disclosed?" *Ibid.* (Because the Admiralty later decided in its discretion to release Chalacombe, the matter was never decided by the court. *Ibid.*)[23]

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[23] *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (cited at Hafetz, *supra*, at 2525 n.117) involved a bargeman who was impressed by order of the Admiralty while he was ferrying timber to the royal timber-yard under "the faith of a protection from the Navy Board," effectively granting him immunity from impressment during that service. *Ibid.* Although Goldswain did not have a statutory immunity from impressment, the court suggested that the case involved bad faith on the part of the Admiralty (and perhaps an attempt by the Admiralty to obtain a court test of the authority of the Navy Board to grant such protection), warned the Admiralty that it would consider discharging Goldswain because of that appar-

The absence of cases testing officials' discretion to confine, or dispense with confinement of, a prisoner may reflect the fact that "[t]he concept of 'discretion' was not well developed at common law." Hafetz, *supra*, at 2534. For that very reason, however, lawyers familiar with the common law in 1789 would not have understood that the writ would issue based on an allegation that an official had improperly declined to exercise his discretion not to act on his unquestioned legal authority to take an individual into custody. Petitioners' claim to habeas corpus, therefore, has no root in the soil of English common law.

3. Petitioners also argue (Br. 22-29) that judicial review of their challenges to their removal orders is compelled by the Suspension Clause because (a) this Court stated in *Heikkila* that Congress, in pre-1952 immigration statutes, had made administrative decisions "nonreviewable to the fullest extent possible under the Constitution," 345 U.S. at 234-235, and yet (b) during the operation of those pre-1952 statutes, courts sometimes reviewed aliens' claims that administrative officials had erred in finding them ineligible for discretionary relief from deportation. Therefore, petitioners argue, because the courts considered those claims on habeas corpus, judicial review to that extent must have been constitutionally compelled, and so elimination of the opportunity for judicial review of such claims would be unconstitutional.

Petitioners' reliance on the dictum in *Heikkila* is flawed for several reasons.[24] First, *Heikkila* itself involved a consti-

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ent bad faith, and suggested that the Admiralty reconsider the propriety of its impressment of Goldswain. *Id.* at 712. The Admiralty, taking the court's hint, decided to release Goldswain. *Id.* at 713. *Goldswain's Case* did not involve a charge of abuse of an official's discretion not to take an individual into custody, but rather a violation of the principle that individuals may rely on official assurances that their conduct is legally protected —a "traditional notion[] of fairness" in our justice system. Cf. *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973).

[24] The language in *Heikkila* relied on by petitioners was unnecessary to the holding of that case, which was that aliens could not seek judicial

tutional challenge to a provision that made membership in the Communist Party *per se* a ground for deportation. 345 U.S. at 230. A three-judge court dismissed the case, and this Court affirmed on the ground that the validity of the deportation order entered against Heikkila under that provision could be tested only on habeas corpus, and not in an action under Section 10 of the APA. The Court reasoned that the finality provision of the 1917 Act precluded judicial review within the meaning of the APA. See *id.* at 232-237. The claim in *Heikkila* therefore fell squarely within the traditional scope of habeas corpus, because it challenged the constitutionality of the statute under which the alien was ordered deported and restrained of his liberty. The decision therefore lends no support to petitioners' argument that the Suspension Clause requires review on habeas corpus of their *non-constitutional* claim concerning *discretionary relief from deportation.* Indeed, in describing the scope of habeas corpus, the Court stated that, "[r]egardless of whether or not the scope of inquiry on habeas corpus has been ex-

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review of their deportation orders under the APA, but were remitted to the more restrictive remedies of habeas corpus proceedings. See 345 U.S. at 233-235. Although, as we explain in the text, the Court relied on the fact that the scope of judicial review under the APA was significantly broader than the review available in habeas corpus proceedings, see *id.* at 236, that would have been true even if the review available on habeas corpus was in turn broader than the scope of review required by the Constitution itself.

Amicus ABA observes (Br. 12-13) that, in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893), the Court stated that "[t]he power to exclude or to expel aliens" is subject to exclusive legislative and executive control, "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." That case, however, did not involve the scope of the writ of habeas corpus. Moreover, the question in this case is not whether (as the Court suggested in *Fong Yue Ting*) *some* judicial review of deportation orders is required by the Constitution; rather it is whether the Constitution requires judicial review specifically of determinations about an alien's eligibility for discretionary relief from deportation—a matter that was not at issue in *Fong Yue Ting.*

panded, the function of the courts has always been limited to the enforcement of due process requirements." *Id.* at 236. "To review those requirements under the Constitution," the Court continued, "whatever the intermediate formulation of their constituents, is very different from applying a statutory standard of review" under the APA. *Ibid.*

Second, even if Congress did, in the pre-1952 immigration statutes, limit judicial review to the constitutional minimum required by the Suspension Clause, it does not follow that the Court must now conclude that, in every case in which the Court considered a legal issue on habeas corpus under those statutes, review of that issue on habeas corpus was constitutionally compelled—especially if the Court did not address in such a case either the scope of its habeas corpus jurisdiction or the scope of judicial review required by the Constitution. For example, petitioners cite (Br. 25) *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), as the instance in which the Court held on habeas corpus that the BIA failed to exercise its own discretion in ruling on an application for discretionary relief and reversed the denial on that ground. But the Court reversed the lower courts' summary denial of the writ in *Accardi* only because of allegations of a deliberate circumvention of established procedures and prejudgment by the BIA in the case. See *id.* at 266-269. The Court did not undertake to delineate the scope of the writ of habeas corpus, and it certainly did not state that habeas corpus review in that case was compelled by the Constitution. This Court has never considered itself bound by such *sub silentio* assertions of jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984).[25]

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[25] Petitioners also cite (Br. 25) *Jay* v. *Boyd*, *supra*, as a case in which the Court ruled that the alien had a "right to a ruling on [his] eligibility" for discretionary relief from deportation. *Jay* is inapposite for several reasons. First, the Court once again did not address the scope of review by habeas corpus that may be required by the Suspension Clause. Second, no

Third, although this Court's immigration decisions under pre-1952 law do not expressly state the source of the courts' authority to grant habeas corpus, that authority was presumably the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385-386; see Rev. Stat. §§ 751-766 (1875).[26] The scope of review authorized by the 1867 Act, however, was much broader than that authorized by Congress's original provision for habeas corpus in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.[27] Whereas the 1867 Act authorized the courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the con-

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issue was presented in that case concerning the alien's statutory eligibility for discretionary relief; the BIA found in that case that Jay was eligible for relief, and Jay did not challenge any aspect of that determination. *Id.* at 352-353. Rather, Jay challenged the BIA's exercise of its discretion to deny him relief based on confidential information, and the Court rejected that challenge. *Id.* at 353-356. Third, although the Court described the applicable statutory provisions as providing a right to a ruling on eligibility, it did not suggest that every provision of an immigration statute that confers on the Attorney General the discretionary power to grant dispensation from deportation must be held to confer a personal right of the sort that the Constitution requires the courts to review on habeas corpus--even where, as here, Congress has in the very same law foreclosed judicial review of such a claim. Indeed, the fact that Congress has precluded judicial review of petitioners' claim here is a powerful indication that it did not intend to confer such a right in the first place. Finally, although *Jay* v. *Boyd* technically arose on habeas corpus proceedings (see *id.* at 347), it was governed by the INA of 1952, which allowed much more extensive review of immigration decisions than had been the case in habeas corpus proceedings under pre-1952 law. See *Heikkila*, 345 U.S. at 236. (Similarly, *Dessalernos* v. *Savoretti*, 356 U.S. 269 (1958), cited by amicus ABA (Br. 21), is inapposite because that case also arose under the INA of 1952.)

[26] The Court has long understood its authority to grant habeas corpus to rest in statutory enactments. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); *Lonchar* v. *Thomas*, 517 U.S. 314, 324, 326 (1996).

[27] See *Felker*, 518 U.S. at 659 (noting that "Congress greatly expanded the scope of federal habeas corpus in 1867"); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-326 (1867) (observing of 1867 Act that "[i]t is impossible to widen this jurisdiction"); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 47-48 (3d ed. 1998) (discussing 1867 Act's widening of scope of habeas corpus).

stitution, or any treaty or law of the United States," 14 Stat. 385, the 1789 Act provided only that federal judges had "power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." 1 Stat. 82. The 1789 Act thus echoed the common law and the 1641 Act in requiring only an inquiry into whether the custodian had some legal basis for the detention of the petitioner.[28] The 1789 Act, nearly contemporaneous with the ratification of the Constitution, is presumably the more reliable indicator of the Framers' understanding of the minimum scope of judicial review required by the Suspension Clause. Thus, even if this Court did, under pre-1952 law, construe the Habeas Corpus Act of 1867 to reach claims like those presented by petitioners here, it would not follow that the Suspension Clause required a judicial forum for such claims.

Fourth, as we have explained in our brief in *St. Cyr* (at 28-29), in its pre-1952 decisions, this Court held that four kinds of challenges could be raised on habeas corpus: (1) claims that a person alleged to be an alien was in fact a citizen; (2) claims that the alien's case did not fall within one of the statutory categories providing for deportation or exclusion claims; (3) claims that the alien had been deprived of a fundamentally fair administrative proceeding; and (4) claims that the administrative officer's finding of deportability was completely without supporting evidence and was therefore violative of due process.[29] This case does not fall within any

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[28] See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 47 (1965) (noting that, before 1867, "[t]he sole question before the court was the formal legality of the detention"); see also *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 573-574, 577-579 (1833) (granting habeas corpus because petitioner was invalidly detained for nonpayment of fine pursuant to civil process, but also holding that writ could not be granted based on petitioner's contention that fine imposed was unconstitutionally excessive).

[29] See, *e.g.*, *Tod* v. *Waldman*, 266 U.S. 113, 118 (1924), modified, 266 U.S. 547 (1925); *Ng Fung Ho* v. *White*, 259 U.S. 276, 283-284 (1922); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 458 (1920); *Gegiow* v. *Uhl*, 239 U.S. 3, 9

of those categories, for petitioners concededly are removable aliens and have made no claim that their removal proceedings were fundamentally unfair. Moreover, IIRIRA permits judicial review of all four kinds of challenges. As we have explained (pp. 22-23, *supra*), even under Section 1252(a)(2)(C), the court of appeals has jurisdiction to determine whether a petitioner challenging a removal order is an alien and whether he is removable. We have also explained (pp. 23-24, *supra*) that Section 1252(a)(2)(C) should not be read to preclude review of substantial constitutional challenges to removal orders. Accordingly, IIRIRA affords the full scope of judicial review that this Court's pre-1952 decisions held were required to be heard on habeas corpus.

B. Neither The Due Process Clause Nor Article III Requires A Judicial Forum For Petitioners' Non-Constitutional Claims

1. Petitioners argue (Br. 34-38) that the Due Process Clause requires a judicial forum for consideration of their

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(1915); *Tang Tun* v. *Edsell*, 223 U.S. 673, 681 (1912); *Chin Yow* v. *United States*, 208 U.S. 8, 11-12 (1908). All of this Court's decisions cited by petitioners at Br. 22-24 fall into one of those four categories, with the possible exception of *United States ex rel. Mensevich* v. *Tod*, 264 U.S. 134 (1924). In that case, the petitioner alleged that his warrant of deportation was invalid because it provided for his deportation to "Poland, the country whence he came," pursuant to the 1917 Act's provision authorizing deportation of aliens "to the country whence they came." See *id.* at 136. The petitioner contended that, because he had resided in a province of Russia before his emigration to the United States (there having been no sovereign state of Poland at the time of his emigration), a warrant ordering his deportation to Poland as "the country whence he came" was a nullity. The claim, although rejected by the Court on the merits, was cognizable on habeas corpus because it contended that the process pursuant to which the petitioner was detained was invalid. Cf. *Watkins*, 32 U.S. (7 Pet.) at 577-579 (holding that prisoner could not be detained for collection of fine after return-day pursuant to civil process of *capias ad satisfaciendum*); *The Case of Pressing Mariners* (1743), 18 State Trials 1323-1325 (1816) (charging jury that attempted impressment of merchant seaman was invalid because warrant required that impressment be executed by captain or lieutenant, neither of whom was present during attempt).

contentions that the Attorney General erred in finding them ineligible for discretionary relief from deportation. That contention finds no basis in this Court's immigration decisions. Indeed, the Court long ago settled the matter to the contrary:

> Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.

The Japanese Immigrant Case, 189 U.S. 86, 100 (1903) (internal quotation marks and citations omitted); see also *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("No judicial review is guaranteed by the Constitution."). The Court has stated that the removal proceeding itself must comport with constitutional due process, and that judicial intervention may be warranted under the "paramount law of the Constitution" to correct departures from that constitutional guarantee of fundamental fairness. See *ibid.* But the Court has not held that judicial review of *non-constitutional* challenges to removal orders is required by the Due Process Clause when (as in this case) the removal proceeding itself was fundamentally fair. Much less has the Court required judicial supervision as a constitutional matter when the challenge, as here, is to the Attorney General's determination about discretionary relief from deportation, which is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. at 354.

Thus, the Due Process Clause does not prevent Congress from committing to the Attorney General the authority to

make the final determination whether an alien is eligible for discretionary relief from removal. The tradition of committing immigration decisions to administrative officials, the consistency of removal proceedings with due process, and the discretionary nature of relief from removal all distinguish this case from those in which, petitioners contend (Br. 36-39), this Court has stated that judicial review is required as a matter of due process. In *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), for example, the Court concluded that due process requires judicial review of the amount of punitive damages awards to ensure that such awards are not grossly excessive. That case, however, depended on two crucial factors: first, that the Constitution also prohibits grossly excessive punitive damages (*id.* at 420), and second, that punitive damages are assessed through the judicial system, by a jury award. Thus, if the judiciary did not have the power to review juries' punitive damages awards, no institution would be available to enforce the constitutional guarantee against excessive damages. See *id.* at 432-433.

In *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, 134 U.S. 418, 458 (1890), and *Phillips* v. *Commissioner*, 283 U.S. 589, 595-598 (1931), the Court stated that due process required judicial review of administrative determinations about the reasonableness of common carriers' transportation rates and tax deficiency assessments, respectively. In those cases, however, the crucial factor was that the administrative procedures themselves were summary and did not provide an opportunity for a hearing on a disputed factual issue, a fundamental requisite of due process.[30]

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[30] See *Chicago, Milwaukee*, 134 U.S. at 457 (noting that, before the state commission, "[n]o hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law"); *Phillips*, 283 U.S. at 595 (permitting tax collection by summary administrative procedure provided that an

Accordingly, those cases simply establish variants of the core due process requirement of notice and a hearing before the final deprivation of a property interest. They do not suggest that the Due Process Clause requires judicial review of non-constitutional challenges to an administrative determination if, as here, the administrative proceeding itself is fundamentally fair.

In *ICC* v. *Brimson*, 154 U.S. 447 (1894), the Court upheld a provision of the Interstate Commerce Act that authorized the ICC to obtain judicial enforcement of its orders requiring the attendance of witnesses and the production of documents in investigations against a challenge that such enforcement devolved upon the federal courts tasks that were outside their authority under Article III, and also stated (*id.* at 485) that, under the Due Process Clause, the ICC would not have authority to enforce its orders by imprisonment on its own. Imprisonment, however, may well be a unique sanction that requires some kind of judicial hearing. But even though removal is undoubtedly a severe sanction, this Court has never likened it to imprisonment, and the full panoply of due process requirements applicable to criminal prosecutions have never been required in removal proceedings. See, *e.g.*, *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955) (upholding conduct of deportation proceedings by special inquiry officer who was subject to supervision and control of INS officials). *A fortiori*, those requirements do not apply to the manner for granting discretionary relief from removal.

2. Petitioners also contend (Br. 38-42) that Congress's preclusion of judicial review of their claims violates Article III, Section 1's commitment of the "judicial Power of the United States" to the federal judiciary. This Court has long made clear, however, that Congress may assign exclusive re-

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opportunity for judicial review follows). Cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990) (holding that, in the unusual context of tax collection, a State may collect taxes by summary procedure provided that a full due process remedy is later available).

sponsibility for resolving controversies between the federal government and individuals involving "public rights" to tribunals lacking the attributes of Article III courts and officers without the salary and tenure protections of Article III judges. See *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). In particular, when a matter is one that could be conclusively resolved by the Legislative and Executive Branches, the Constitution also permits Congress to commit the matter to an adversary determination by officers other than Article III judges. See *Union Carbide*, 473 U.S. at 589; *Bakelite*, 279 U.S. at 452-453; cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opnion). That is precisely the situation here. Congress could have, in the exercise of its constitutional powers over immigration, expressly provided in *haec verba* that no alien placed in removal proceedings on or after April 1, 1997 would be eligible for relief under Section 1182(c), regardless of the date of his conviction; or it could have provided that no aggravated felon whatever should receive such relief, regardless of the date of conviction; or it could have provided, as it did before 1917, that no alien should receive discretionary relief from removal at all. The fact that the BIA was required to engage in some interpretation of Congress's enactments to conclude that aliens placed in removal proceedings under IIRIRA may not receive relief under former Section 1182(c) does not mean that an Article III court must be available to review that conclusion.

Petitioners suggest (Br. 38-39) that, while this Court has allowed Congress to assign initial adjudication of a controversy to a non-Article III actor, it has done so only on the understanding that some form of Article III judicial review of those determinations would follow. That reading of this Court's cases is simply incorrect. The Court has emphasized

the availability of ultimate Article III review when the matter committed to initial administrative decision-making involved *private* rights (especially private *state-law* rights) that traditionally would have been submitted to the courts for resolution.[31] As the Court has explained, heightened Article III concerns are presented when Congress attempts to "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty" (*Murray's Lessee*, 59 U.S. (18 How.) at 284), because those are the cases that the Framers would have understood to require judicial resolution. Cf. *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment) (Article III requires judicial resolution of "the traditional actions at common law tried by the courts at Westminster in 1789"). No such contention can be made here, for there was no tradition at English common law of judicial resolution of the rights of aliens to enter or remain in the country.[32] Accordingly, Article III does not require a judicial forum for resolution of petitioners' non-constitutional claims concerning discretionary relief from removal.

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[31] See *CFTC* v. *Schor*, 478 U.S. 833, 854 (1986) ("[W]here private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching."); *Crowell* v. *Benson*, 285 U.S. 22, 51-52 (1932); cf. *Northern Pipeline*, 458 U.S. at 80-82 (plurality opinion) (noting distinction between state-law and federal-law rights).

[32] In addition, as was the case in *Union Carbide*, the statute at issue here "limits but does not preclude review of the * * * proceeding by an Article III court." 473 U.S. at 592. Judicial review remains available to ensure that the Attorney General acts within the scope of his statutory authority in determining that an alien is removable, and that the alien's removal proceedings are conducted according to constitutional requirements of due process. Cf. *ibid.*

III. IF JUDICIAL REVIEW OF PETITIONERS' CHALLENGES IS CONSTITUTIONALLY REQUIRED, THAT REVIEW SHOULD PROCEED IN THE COURT OF APPEALS, NOT IN THE DISTRICT COURT

If the Court concludes, contrary to our submission, that the Constitution requires judicial review of petitioners' non-constitutional challenges to their removal orders, then that review should proceed in the court of appeals on petition for review, and not in the district court on habeas corpus. This Court has explained that, when a statute has been held unconstitutional, a court should adopt the remedy that is most consistent with Congress's overall objectives. See *Califano* v. *Westcott*, 443 U.S. 76, 89-90 (1979); cf. *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984). Review in the court of appeals would be much more consistent with Congress's unmistakable design in IIRIRA, which is to bar district court review of removal orders completely, but to allow at least a very limited review of removal orders, even for aggravated felons, in the courts of appeals. See pp. 18-31, *supra*; *St. Cyr* Gov't Br. 31-32.

Review in the court of appeals is more consistent with Congress's objectives than district court review for at least two reasons. First, since 1961, the judicial-review provisions of the INA have been predicated on Congress's concern that the deportation of aliens was often subject to unwarranted delay because of the process of judicial review, and that review in the court of appeals would expedite and streamline that process and accordingly reduce such delays. See *Stone*, 514 U.S. at 399-400; *Foti*, 375 U.S. at 224-225; pp. 4-5, *supra*. Review in district court on habeas corpus under 28 U.S.C. 2241, however, affords aliens significant opportunities for delays in the execution of their removal orders. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits

governing the exclusive-review procedures of the INA, see 8 U.S.C. 1252(b)(1) (Supp. V 1999). Also, unlike the INA, Section 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. V 1999); *Stone*, 514 U.S. at 393-394. And, of course, an alien who is unsuccessful in district court can appeal to the court of appeals, and thereby obtain further delay.

Second, Congress reinforced its preference for judicial review in the court of appeals in IIRIRA when it enacted Section 1252(b)(9), which provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [the INA] shall be available only in judicial review of a final order under this section [1252]." The Court has described that provision as an "unmistakable 'zipper' clause" channeling judicial review to the courts of appeals. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Petitioners' challenges to their removal orders fall squarely within that zipper clause. Their claims that they are eligible for relief under former Section 1182(c) involve the "interpretation" of "statutory provisions," and also "aris[e] from an[] action taken or proceeding brought to remove [them] from the United States." *Id.* at 481. Indeed, petitioners' challenges to the constitutionality of Congress's preclusion of review of their non-constitutional claims are covered as well by the zipper clause, because those challenges involve the interpretation of "constitutional provisions" arising out of an action to remove them from the United States. Thus, Section 1252(b)(9) provides the rule for a remedy in this case: Any challenge to a removal order for which judicial review is required must proceed only in the court of appeals, pursuant

to the Hobbs Act's exclusive-review procedures incorporated by Section 1252(a).[33]

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it dismissed the petitions for review, but modified to provide that the dismissal is with prejudice to the filing of a petition for a writ of habeas corpus in the district court.

Respectfully submitted.

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[33] Petitioners have argued (Br. 2, 42-43) that the Constitution requires only that such review be available in some federal court, not that it be available in district court in the first instance.

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In The

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

Petitioners challenge the Attorney General's ruling that, as a matter of law, he has no statutory authority to grant petitioners a hearing on their request for relief under 8 U.S.C. 1182(c). The government contends that IIRIRA precludes review in any court, including this Court, of that pure question of law. Petitioners' submission is that IIRIRA can be construed to allow either the court of appeals (in a petition for review) or the district court (under 28 U.S.C. 2241) to adjudicate petitioners' claims, and that a complete prohibition of jurisdiction in any court would violate the Constitution.

The government's brief does not dispute the essential elements of our analysis. The government agrees that the preclusion statute should be construed in light of background presumptions and rules of construction. On that issue, therefore, the disagreement between the parties is over which rule(s) of construction should apply. The government also does not dispute that the Suspension Clause protects the historic role of habeas corpus inquiry over *non*-constitutional claims, at least in the context of federal *executive* detention. Nor does the government disagree that the habeas inquiry historically exercised by this Court to determine the legal validity of a deportation order encompassed constitutional as well as non-constitutional claims.

The government's submission instead rests on the contention that the *particular* type of legal claim raised by petitioners is barred, and that the preclusion of review is unproblematic because it concerns eligibility for discretionary relief. The government argues that the Suspension Clause does not protect that claim because petitioners are "indisputably deportable," because the Attorney General *might* have chosen to deny their requests in the exercise of discretion, and because this Court's habeas review of non-constitutional claims relating to discretionary deportation relief should be disregarded as insufficiently explicit or not constitutionally compelled.

The government's brief does not offer any affirmative authority from this Court's immigration jurisprudence or from the common law history of habeas corpus (in this country or England) supporting the view that petitioners' legal claim falls outside the historic core of habeas scrutiny of non-judicial executive detention. The government's arguments, moreover, are refuted in their entirety by this Court's decision in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), are dependent on conflating the difference between *eligibility* for relief and the *exercise* of discretion, and ultimately hinge on the unsupportable contention that because petitioners are "deportable" within the meaning of the immigration act, the Attorney General could "detain and remove" them without ever adjudicating their claim for relief.

A. *Statutory Construction.* As we explained in our opening brief (at 17-26, 42-49), Section 1252(a)(2)(C) should be construed to preclude the broad scope of "review" that is available for final orders of removal generally, but not the more circumscribed scope of review traditionally provided by habeas corpus.[1] Our construction would permit the courts of appeals to exercise petition-for-review jurisdiction in cases involving aliens removable on the basis of one of the enumerated criminal offenses, but only insofar as the alien raises a claim encompassed by the scope of inquiry traditionally exercised in a habeas corpus action. Alternatively, if petition-for-review jurisdiction were unavailable, the statute should be read to

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[1] Section 1252(a)(2) refers to "Matters not subject to judicial review." Petitioners' opening brief (at 17) inadvertently referred to Section 1252(a)(2)(C) as also using the term "judicial review." As the government correctly notes (at 26), subsection (C) of Section 1252(a)(2), like the other subsections, uses the term "review." Given Section 1252(a)(2)'s reference to "judicial review," use of the shorthand term "review" in its subsections has no significance. In any event, petitioners' submission on the construction of Section 1252(a)(2)(C) does not turn on any difference between the terms "review" and "judicial review."

permit district courts to exercise habeas jurisdiction under 28 U.S.C. 2241 over petitioners' claims. This brief will address only the court of appeals avenue, and will not repeat the arguments supporting district court review made in our opening brief (at 44-49), and more fully in the respondent's brief in *INS v. St. Cyr*, No. 00-767 (at 8-19).

Construing Section 1252(a)(2)(C) to preserve the minimum scope of habeas scrutiny is supported by two lines of authority. The first is this Court's decisions in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), in which the Court refused to find a repeal of its original habeas corpus jurisdiction in the absence of an express directive. The second is the voluminous body of immigration habeas law decided by this Court under the "finality" provisions enacted by Congress between 1891 and 1952, in which the Court repeatedly acknowledged the broad preclusive effect of the finality provisions and yet consistently preserved habeas corpus. *See* Pet. Br. 17-29; *see also* Brief *Amicus Curiae* American Bar Association 11-16, 22-24 (collecting cases). Notably, although the government takes issue with certain aspects of the Court's decision in *Heikkila v. Barber*, 345 U.S. 229 (1953), it does not dispute *Heikkila*'s holding of statutory construction, in which the Court comprehensively discussed and reaffirmed the longstanding rule that the INA's finality provisions should be read to preclude broad APA-type review, but not habeas corpus.

1. The government itself does not urge the Court to read Section 1252(a)(2)(C) to preclude all review. Instead, it reads Section 1252(a)(2)(C) to allow aliens to raise claims challenging whether they fall within the coverage of the jurisdictional preclusion statute, and thus, to challenge whether the BIA correctly concluded that they are aliens who are removable on the basis of an offense listed in Section 1252(a)(2)(C). The government further urges the Court to read

Section 1252(a)(2)(C) to permit aliens to raise constitutional claims challenging their removal order, even if the alien falls within the coverage of Section 1252(a)(2)(C).

The government does not offer a textual basis for its reading of the statute but argues that Section 1252(a)(2)(C) should be read in light of this Court's jurisprudence permitting courts to determine their own jurisdiction (Gov't Br. 21-23) and in light of the jurisprudence concerning review of constitutional claims, which the government reads as establishing an express statement rule permitting review of constitutional claims where "neither the text nor the legislative history of [a] provision adverts specifically to preclusion of review of constitutional claims . . . ." Gov't Br. 23. The government urges this Court to rely solely on its rules of construction, while contending that the Court should not invoke the habeas corpus canons on which petitioners rely.

The government offers no convincing reason for reading Section 1252(a)(2)(C) only in light of the canons on which it relies. Moreover, the government's construction of the statute would not avoid serious constitutional issues. In this case the Court would still be faced with the far-reaching constitutional question of whether pure legal claims can be wholly precluded where an administrative agency has ordered a deprivation of personal liberty.[2]

2. The government relies heavily (at 19-21) on statements made by Senator Abraham in support of its position that the statute precludes even the narrow scope of habeas inquiry. However, the government's own position is inconsistent with the quoted passages, which suggest that

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[2] The cases cited by the government involve benefits, *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Johnson v. Robison*, 415 U.S. 361 (1974), and employment, *Webster v. Doe*, 486 U.S. 592 (1988). In those very different contexts not involving a deprivation of liberty, the Court did not discuss the right to judicial review of non-constitutional claims.

Senator Abraham believed that aliens with certain criminal convictions should be afforded no judicial scrutiny of any claim, including those the government would permit. Furthermore, Senator Abraham's statements appear remarkably similar to the basic thrust of the finality provisions in effect between 1891 and passage of the 1952 Immigration Act. Taken literally, those provisions would have made the administrative determination "final," yet the Court preserved habeas inquiry to ensure that administrative immigration officials acted within the *legal* limits imposed by Congress. Insofar as relevant, Senator Abraham's statements should be understood in light of this pattern of judicial construction, especially given the absence of any suggestion that he intended to ignore this Court's habeas jurisprudence in the immigration area.[3]

3. The government also argues that Section 1252(a)(2)(C) should be construed to preclude all judicial scrutiny of petitioners' legal challenge because that provision is part of a "single, comprehensive package of provisions" in which the "very same aliens" who are precluded from applying for relief from deportation are also precluded from obtaining judicial review. Gov't Br. 17-18. Contrary to the factual premise of that argument, the reach of the jurisdictional preclusion statute is *not* coterminous with the bars on relief. Section 1252(a)(2)(C), by its terms, precludes review in cases involving criminal offenses other than "aggravated felonies."[4]

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[3] To the extent the government relies on the general goal of expediting the removal of aliens with criminal convictions, that goal is not hindered because the INA, as now amended by IIRIRA, no longer precludes courts from reviewing final orders *after* the alien has been physically removed from the country. *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c)).

[4] Section 1252(a)(2)(C) applies to, *inter alia*, *any* two crimes of moral turpitude (where the possible sentence is one year) under INA § 237(a)(2)(A)(i) & (ii) [8 U.S.C. 1227(a)(2)(A)(i) & (ii)], *any* firearm offense

Thus, aliens who are not "aggravated felons" are precluded from obtaining judicial scrutiny of their legal claims under the government's jurisdictional position.

4. The government also points to various provisions of the INA where Congress provided for "judicial review" in habeas corpus proceedings and argues that these provisions show that the term "review" in Section 1252(a)(2)(C) should be understood to apply to habeas corpus. Gov't Br. 27-29. The bulk of the government's structural arguments, however, seek to prove that Congress intended to preclude *district court* habeas proceedings. Insofar as the government's arguments seek to prove that the term "review" in Section 1252(a)(2)(C) must be understood to preclude a narrow habeas inquiry in *any* court, those arguments are unavailing. Structural evidence and negative inferences are insufficient to repeal the scope of habeas inquiry under *Felker/Yerger* and this Court's immigration habeas decisions.[5]

(including failure to register) under INA § 237(a)(2)(C) [8 U.S.C. 1227(a)(2)(C)], and *any* drug offense (including simple possession or abuse) under INA § 237(a)(2)(B) [8 U.S.C. 1227(a)(2)(B)]. *See also* Gov't Br. 22 (noting that Section 1252(a)(2)(C) applies to more than aggravated felons).

[5] Moreover, even in the absence of an express statement rule, the government's structural arguments would be insufficient. The government does not dispute that for more than 60 years this Court consistently preserved habeas corpus in the face of finality provisions that barred judicial review. Rather, the government contends only that a statute foreclosing judicial review need not "necessarily" be construed to preserve habeas corpus. Gov't Br. 28. But even if habeas corpus could be barred without an explicit directive, the relevant inquiry under this Court's finality-era decisions would nonetheless be whether IIRIRA's restriction on judicial review *must* be read to bar habeas corpus, not whether it is possible to read the restriction in that sweeping manner. The government has not made that showing. The habeas provisions on which the government relies each provide for "judicial review" through the *mechanism* of a habeas corpus proceeding. Gov't Br. 27-29 (citing, *e.g.*, 8 U.S.C. 1252(e)(2); former 8 U.S.C 1105a(b); former 8 U.S.C. 1105a(a)(10)). Those provisions do not

B. *The Suspension Clause*. 1. The crux of the government's argument is that because petitioners are concededly "deportable," their legal claim is not protected by the writ guaranteed by the Constitution. Thus, the government asserts that the "fundamental flaw" in our analysis is that petitioners are "unquestionably removable . . . and are seeking the exercise of the Attorney General's power to grant discretionary relief from deportation." Gov't Br. 32. The government's argument is directly contradicted by this Court's ruling in *Accardi* and by the structure and requirements of the deportation process, which do not permit the Attorney General to issue a final order of removal until the application for relief is adjudicated.[6]

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unambiguously establish, however, that every time the INA restricts "review," that restriction must be understood to preclude the *scope* of habeas corpus.

[6] The government's apparent suggestion that the Attorney General's legal ruling is of no consequence because he "could" have exercised his discretion negatively in every case over which he has (erroneously) determined that he lacks discretionary authority, Gov't Br. 32, is contrary to the basic principle that an agency's decision must be defended on the ground on which it was decided. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). An erroneous eligibility determination cannot be defended on the basis of how discretion might have been exercised if the decision-maker had not misconstrued his own authority. *See FEC v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case -- even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (correcting legal error and remanding to Attorney General for discretionary determination). In any case, there is no reason to presume that the Attorney General would unilaterally deny the application of every applicant who would be eligible if he properly understood his statutory authority. In the past, half the applications were granted. Pet. Br. 5. Many of the legal residents barred from eligibility by retroactive application of the new statute would be especially worthy candidates. *See* Brief *Amici Curiae* Florida Immigrant Advocacy Center, *et al.* in *INS v. St. Cyr* 7-20 (collecting cases).

In *Accardi*, an alien who was "admittedly deportable," 347 U.S. at 261-62, and whose ground of deportation was "uncontested," *id.*, brought a habeas corpus action to challenge the denial of discretionary (suspension of deportation) relief. The Court expressly acknowledged the discretionary nature of the relief, *see id.* at 268, but rejected the dissenters' objections that the scope of habeas inquiry did not encompass the petitioner's legal claims. The dissent in *Accardi* raised each of the objections put forth by the government in this case, including (1) that the alien "does not question his deportability," (2) that "the only question" concerned a form of relief over which the ultimate grant or denial rested in the discretion of the Attorney General, (3) that there was no "private right" involved in the request for discretionary relief, and (4) that "no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended." *Id.* at 269-70 (Jackson, J., *dissenting*). This Court rejected those arguments, exercised habeas jurisdiction, and granted relief to the petitioner. The Court explained that it was not "reviewing and reversing the *manner* in which discretion was exercised," but rather, "the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." *Id.* at 268 (emphasis in original).[7]

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[7] *Accardi* is consistent with a long line of habeas decisions in the courts of appeals deciding legal eligibility for discretionary relief, which the government never addresses or refutes. *See* Pet. Br. 25 n.10 (collecting courts of appeals cases). The one such case the government cites is *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (L. Hand, J.). That case concerned a challenge to the *exercise* of discretion. Even in that context, however, Judge Hand explained that habeas would lie if "it affirmatively appears that the denial has been actuated by considerations that *Congress could not have intended* to make relevant." *Id.* at 491 (emphasis added). *A fortiori*, habeas jurisdiction lies to challenge the Attorney General's legal ruling that Congress divested him of all statutory authority to exercise discretion.

The government seeks to avoid the dispositive significance of *Accardi* on the grounds that the Court did not "delineate the scope of the writ" and that it did not expressly state that the habeas review in that case was "compelled by the Constitution." Gov't Br. 39. While the Court did not delineate the scope of the writ in respect to *all* claims, it did expressly hold that habeas corpus encompassed legal claims relating to discretionary relief, which was the entire focus of the dissent. Moreover, the Court's exercise of jurisdiction over the challenge in that case demonstrates that habeas review necessarily encompasses the claim presented here. The petitioner in *Accardi* challenged the BIA's failure to conduct an independent exercise of discretion as required by the regulations, even though the Attorney General had ultimate authority to overturn the BIA's decision. *Accardi,* 347 U.S. at 268. In the present case, petitioners' claim is that the Attorney General has failed to exercise discretion altogether in violation of the statute.

The government's further contention that *Accardi* did not mention the constitutional right to habeas corpus disregards the crucial fact that *Accardi* was decided one year after the Court had ruled in *Heikkila* that the scope of habeas scrutiny of deportation orders was limited to that which was "required by the Constitution." 345 U.S. at 234-35. *Accardi* had no reason to reiterate that point. Moreover, the dissent's discussion in *Accardi* of the scope of habeas corpus began by citing (at 269-70) *Nishimura Ekiu*, one of the key cases on which *Heikkila* based its finding that habeas corpus review of immigration orders was limited to the constitutional minimum. 345 U.S. at 233. In light of the detailed dissent specifically addressing the proper scope of habeas, and the Court's express rejection of those views, *Accardi* cannot be dismissed as a *sub silentio* jurisdictional decision. *Cf. Lewis v. Casey,* 518 U.S. 343, 352

n.2 (1996) (ruling not binding because issue "was neither challenged nor discussed" in prior case).[8]

2. Wholly apart from *Accardi*, the government's contention that petitioners' claim is not a challenge to the legal validity of the deportation order, and hence unreviewable in habeas corpus, is erroneous. First, the claim at issue here concerns legal *eligibility* for discretionary relief, and not the exercise of discretion. The government repeatedly conflates these two distinct inquiries, *see* Gov't Br. 15, 31, 32, which, as noted in our opening brief, the Court has made abundantly clear are analytically and legally separate, *see* Pet. Br. 24-25 (citing *Jay v. Boyd*, 351 U.S. 345 (1956)). The government does not rebut that fundamental point, nor could it. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citing *Jay v. Boyd* and noting distinction between "prerequisites for eligibility" and "unfettered discretion").[9]

In addition, the government's argument is entirely dependent on its suggestion that aliens who are deportable have

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[8] The government's attempt to craft four categories, which exclude petitioners' claim, to describe this Court's finality era cases must fail. Gov't Br. 41. Either the *Accardi* claim -- and therefore also petitioners' -- fits within one of the government's categories (*e.g.*, as a claim asserting deprivation of a "fundamentally fair administrative hearing," Gov't Br. 41) or the categories are artificial and incomplete. As the government effectively concedes, other cases also do not fit within the categories. *See* Gov't Br. 41-42 n.29 (discussing *United States ex rel. Mensevich v. Tod*, 264 U.S. 134 (1924)). *See also Amicus* ABA Br. 16 n.12.

[9] *See also Foti v. INS*, 375 U.S. 217, 228-29 n.15 (1963) ("finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters"); *Chadha v. INS*, 634 F.2d 408, 426 (9th Cir. 1980) (Kennedy, J.), *aff'd*, 462 U.S. 919 (1983) ("Each of the[ ] [statutory] prerequisites [for suspension] requires a legal determination of a traditional sort, the contents of which are explicated by an orderly history of administrative practice and judicial review and interpretation.").

no claim that could be protected by the Suspension Clause. Gov't Br. 33. But insofar as the government is arguing that an alien who is "deportable" can be "detain[ed] and remov[ed]," Gov't Br. 33, without any adjudication of a claim for discretionary relief under Section 1182(c), that assertion is flatly wrong. The finding of deportability is only the initial determination in an immigration proceeding. A deportation order cannot issue until the claims for discretionary relief from deportation have been adjudicated. The Attorney General must determine if the alien is statutorily eligible, and if eligible must adjudicate the application. Only at the conclusion of that process does a final order issue, and only at that point does the Attorney General have authority to remove the alien. *See* 8 C.F.R. 212.3(e) (1996) (requiring that Section 1182(c) application "shall be adjudicated by the Immigration Judge" during deportation proceedings); *Foti v. INS*, 375 U.S. 217, 223 (1963) (holding that a decision on discretionary relief from deportation "[is] an integral part of the proceedings which have led to the issuance of a final deportation order"); *Dessalernos v. Savoretti*, 356 U.S. 269 (1958) (per curiam) (holding that alien is "entitled to have his application for suspension of deportation considered" to determine statutory eligibility); *see also INS v. Chadha*, 462 U.S. 919, 938 (1983) (discretionary relief is a matter "on which the final order is contingent").

Thus, contrary to the government's statements and implicit suggestions, the Attorney General has no legal authority to remove an alien until the relief application has been adjudicated and, if the alien is statutorily eligible, until discretion is exercised. Accordingly, petitioners' claim that the Attorney General has misconstrued the statutory eligibility requirements governing relief goes to the legal validity of the final order, and thus, to the validity of the Attorney General's attempt to remove them. Because the claim goes to the Attorney General's legal authority to remove petitioners, it is reviewable even under the government's understanding of habeas corpus.

See Gov't Br. 33 (stating that habeas corpus involves challenges to the executive branch's "legal authority" to order deprivation of liberty); *id.* at 37 (habeas covers challenges to "legal authority").[10]

3. The government also argues (Gov't Br. 37-39) that the Court's statement in *Heikkila* concluding that the finality provisions had reduced the scope of review to the constitutional minimum was dictum and that *Accardi* (and the other immigration habeas decisions on which petitioners rely) need not be followed because those decisions were not constitutionally compelled.[11] First, as already noted, *Accardi* was decided only one year after *Heikkila*. Thus, whatever dispute there may be over the binding nature of *Heikkila*'s statements regarding the scope of habeas corpus, the effect of the Court's pronouncement on *subsequent* cases such as *Accardi* cannot be disregarded. Second, even assuming that *Heikkila* did not have to rule squarely on the constitutional scope of habeas corpus review, the Court's statements were a central focus of the opinion and were part of a comprehensive discussion of the pre-1952 regime. *Heikkila*, 345 U.S. at 233-

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[10] Other forms of discretionary actions by the Attorney General do not present the same question. For example, the Attorney General's discretion to initiate proceedings in the first place (prosecutorial discretion), or the discretion not to execute a valid final order of deportation after the administrative process has concluded ("deferred action"), are different because they do not affect the validity of the final order and do not have statutory eligibility criteria. *Compare Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-91 (1999). In such instances, the Attorney General can choose whether or not to exercise discretion.

[11] The government's claims about *Heikkila* in this case appear inconsistent with its views in *INS v. St. Cyr*, where it does not contend that *Heikkila*'s statements regarding the pre-1952 regime were dicta. Gov't *St. Cyr* Br. 4 ("This Court ruled that such [deportation and exclusion] orders could be reviewed by writ of habeas corpus, but only to the extent that judicial review was required by the Constitution," citing *Heikkila*).

35. After canvassing the case law and congressional enactments, the Court twice stated that courts could review immigration decisions in habeas only if the review was "required by the Constitution." *Id.* at 235; *see also id.* at 234 (Congress reduced review to the "fullest extent possible under the Constitution").

Third, and most importantly, the government has not demonstrated that the statements in *Heikkila* are incorrect or that the *Heikkila* Court misread the effect of the pre-1952 legislation and this Court's precedents interpreting that legislation. There is no dispute that enactment of the finality provision in 1891 and the subsequent reiterations of it were intended by Congress and understood by this Court to eliminate the courts' role in scrutinizing the expulsion of aliens from the United States. *See* Pet. Br. 19-20 n.8 (collecting cases). Yet the government has not addressed the critical decisions on which *Heikkila* based its analysis, including the first decision interpreting the finality provision, *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). *See* Pet. Br. 18-29 (discussing pre-1952 case law).[12]

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[12] The government notes that *Heikkila* refers to "due process requirements" and implies that the Court may have suggested that the scope of habeas is limited to contemporary procedural due process claims. Gov't Br. 38-39. That would be inconsistent with the scope of review expressly authorized by the Court in the numerous cases cited by *Heikkila* and would also be contrary to Justice Clark's usage of that term. *See Heikkila*, 345 U.S. at 235 (citing *Kessler v. Strecker*, 307 U.S. 22 (1939); *Bridges v. Wixon*, 326 U.S. 135 (1945)). *See also Brownell v. Tom We Shung*, 352 U.S. 180, 182 n.1 (1956) (Clark, J.) ("[D]ue process has been held . . . to include a fair hearing as well as *conformity to statutory grounds*.") (emphasis added); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1393 n.93 (1953) ("Justice Clark must . . . be understood [in *Heikkila*] as saying that the Constitution gives the alien the right, among others, to have the *statutes observed*.") (emphasis added). *See also Amicus* ABA Br. 17 n.13. Indeed, the passage in which the due process language appeared

The government does not offer its own reading of the pre-1952 finality provisions or the Court's decisions interpreting those provisions, except to speculate that those decisions were "presumably" decided on the basis of the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385-86; Rev. Stat. §§ 751-766 (1875), rather than the habeas provision of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. Gov't Br. 40-41. The government then asserts that the scope of review authorized by the 1867 Act was broader than that authorized by the 1789 Act and suggests that the expansion is somehow relevant here. *Id.*

However, the 1867 habeas legislation did not broaden the scope of habeas review in any respect material to this case. Its main purpose was to extend federal habeas corpus to prisoners in state custody. *See In re Neagle*, 135 U.S. 1, 70-72 (1890); *Ex parte Bridges*, 4 F. Cas. 98, 105-06 (N.D. Ga. 1875) (Bradley, C.J.). In this case, petitioners are raising purely legal claims challenging *non*-judicial *executive* detention by the federal government. Such claims were reviewable both before and after 1867. *See* Pet. Br. 29-34 (collecting cases); Brief *Amici Curiae* Legal Historians 18-28. In fact, the Court's immigration habeas decisions under the pre-1952 scheme relied upon pre-1867 habeas decisions, further undermining any suggestion that the Court viewed its decisions in immigration cases involving legal claims as resting on an expanded scope of habeas attributable to the 1867 Act. *See, e.g., Ekiu*, 142 U.S. at 660-62 (citing, *inter alia*, *Ex parte Bollman*, 8 U.S. (4

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in *Heikkila* concerned only "administrative findings of fact." 345 U.S. at 236. Under this understanding of "due process," the Attorney General's erroneous legal ruling in this case, which deprived petitioners of their right to a Section 1182(c) adjudication and hearing, would constitute a due process violation.

Cranch) 75 (1807)).[13] Thus, even if only the Framers' original understanding and historic practice were relevant to inform the scope of habeas corpus protected by the Suspension Clause (a standard that the Court has not adopted, *see Felker*, 518 U.S. at 663-64), petitioners' legal claim falls within the core protection of the Great Writ.

The government's effort to find support in English common law also fails. The government's central point appears to be that habeas covered only a challenge to the legal authority of the detention and that there is "thin" support for the broader proposition that habeas permitted review of a discretionary determination for abuse of discretion. *See* Gov't Br. 35. But petitioners here raise only a legal challenge, and do not challenge any discretionary action.[14]

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[13] None of the three sources offered by the government (Gov't Br. 40 n.27) supports the proposition that the 1867 Act expanded the scope of review in any way material here. *Felker* and the Liebman & Hertz treatise simply note that the 1867 Act extended habeas jurisdiction to state prisoners. *See Felker*, 518 U.S. at 659-60 (explaining that before 1867 there were only limited "instances in which a federal court could issue the writ to produce a state prisoner"); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 47-48 (3d ed. 1998) (discussing expansions in "federal court review of state court criminal actions"). *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 324 (1868), did not concern the scope of habeas, but rather, the 1867 Act's grant of appellate jurisdiction to the Supreme Court over habeas cases.

[14] In any event, the cases that the government discusses, *see* Gov't Br. 35-36 & n.23, suggest a broader use of the writ in England to permit habeas scrutiny of some discretionary powers. Several of the cases involved an element of discretion, yet the critical fact (which the government ignores) is that in each case the writ issued. *See, e.g., Ex parte Boggin*, 104 Eng. Rep. 484, 484 n.(a) (K.B. 1811); Gov't Br. 36 (discussing *Chalacombe* case in which the court acknowledged the existence of the Admiralty's discretion and *issued the writ*); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778), Gov't Br. 36-37 & n.23 (writ issued in challenge to legality of impressment by sailor lacking statutory immunity who asserted Admiralty's bad faith in failing to honor a non-statutory grant of protection). (continued . . .)

In sum, the government acknowledges that the common law writ necessarily encompassed more than constitutional claims given its English origins, and thus, that the 1789 Act (and common law practice) requires inquiry into the *legal* validity of detention. *See* Gov't Br. 41. Consequently, even under the government's own view of habeas corpus, this case hinges on whether petitioners are challenging the legal validity of their deportation orders. As we have already discussed, that issue is resolved by the nature of petitioners' claims, the structure of the deportation process, and this Court's decisions, particularly *Accardi*.

C. *Due Process and Article III.* 1. The government contends that this Court has already decided that due process does not require judicial review of the type of challenges brought by petitioners. Gov't Br. 42-45. However, the two cases on which the government relies (at 43), *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903), and *Carlson v. Landon*, 342 U.S. 524 (1952), do not support that proposition. In *Yamataya*, habeas review was preserved

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The government suggests that Oaks viewed the writ as narrowly available (Gov't Br. 35 n.21), but omits the remainder of the sentence it quotes ("and that once charged he was either jailed or brought to trial within a specified time"), which makes it clear that the passage refers only to habeas corpus challenging *judicial* detention and only in the criminal context. Oaks, in fact, pointedly notes that use of the writ to challenge *non*-judicial detention "reveals the writ of liberty performing what is perhaps its most essential task: freeing persons from illegal official restraints of liberty not founded in judicial action." Dallin H. Oaks, *Habeas Corpus in the States* -- 1776-1865, 32 U. Chi. L. Rev. 243, 266 (1965). The government's reliance (at 41 n.28) on the Mayers article is misplaced for the same reason, since the article is concerned solely with habeas in the post-conviction context. The government also incorrectly relies (at 41 n.28) on *Ex Parte Watkins*, 342 U.S. (7 Pet.) 568 (1833). There, the writ could not be granted on the excessive fine claim because this Court "ha[d] no appellate jurisdiction to revise the sentences of inferior courts in criminal cases." *Id.* at 574.

and the Court therefore had no occasion to decide whether pure questions of law could be wholly precluded from all judicial scrutiny. 189 U.S. at 98 (citing *Ekiu*). Moreover, even the passage quoted by the government (at 43) states only that review of *facts* could be precluded. *Carlson* did not involve the right to judicial review, but rather a challenge to the Attorney General's power to detain pending deportation (over which there was habeas review). 342 U.S. at 526-28. The sentence of dicta quoted by the government suggests only that the Constitution does not necessarily require broad judicial review of immigration decisions. The Court never suggested, however, that review of legal claims could be precluded and indeed specifically cited to habeas decisions reviewing constitutional and statutory claims. *Id.* at 537 n.27, n.28. *See also Amicus* ABA Br. 18 n.14 (discussing *Carlson*).

The government also offers a variety of unpersuasive factual and legal grounds on which to distinguish petitioners' non-immigration cases. For example, the government suggests that *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), which held that due process requires judicial scrutiny of punitive damage awards, does not support petitioners' right to review of statutory claims because there "the Constitution also prohibit[ed] grossly excessive punitive damages . . . ." Gov't Br. 44. But in *Honda*, as the dissent notes, the Court held that due process required judicial scrutiny of the damage award under *both* federal constitutional *and* state law standards. *See* 512 U.S. at 450 (Ginsburg, J., *dissenting*) (dissenting specifically on ground that due process did not require judicial review of *Honda*'s *state* law claims). *See also* 512 U.S. at 435-36 (Scalia, J., *concurring*) (noting that state law placed a "reasonableness" limit on punitive damages and concluding that the "deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing *state*-prescribed limits upon such

deprivations violates the Due Process Clause") (emphasis added).

In short, the Court has never suggested that due process would permit an administrative agency to order a deprivation of liberty without any judicial scrutiny of whether the agency remained within the legal limits on its power. The government has cited no case to the contrary.

2. The government offers one basic response to petitioners' Article III submission and argues that there can be no right to review protected by Article III because immigration has been placed within the "public rights" category. Gov't Br. 45-47. But the Court has eschewed an inflexible, categorical approach in the Article III area and has thus refused "to make determinative for Article III purposes the distinction between public rights and private rights . . . ." *CFTC v. Schor*, 478 U.S. 833, 853 (1986); *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 586-87 (1985) (not endorsing the view that "Article III has no force simply because a dispute is between the Government and an individual" but has instead required "practical attention to substance rather than doctrinaire reliance on formal categories"). *See* Pet. Br. 41-42. Consequently, petitioners' right to a judicial forum must be evaluated in light of the fundamental values protected by Article III and whether those values are impermissibly compromised by allowing the Attorney General to determine the limits of his own statutory enforcement authority.

In any event, as we also explained in our opening brief (at 41-42), the "public rights" theory does not support the preclusion of review under the circumstances here, where petitioners are not seeking broad APA-review and are raising only a pure legal challenge to a deprivation of liberty. The very nature of the habeas writ and its historic purpose could not be reconciled with the government's view that the public rights

doctrine would allow the preclusion of all judicial scrutiny over a legal claim affecting liberty.

Furthermore, notwithstanding the broad language historically used to describe it, the doctrine has not actually been applied as to preclude *all* review. Indeed, even in *Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and other early cases, nonstatutory mechanisms remained routinely available to permit litigants to seek common law remedies. *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 247 (1990) (noting that in *Murray* review was actually available and stating that it "has never been supposed" that judicial scrutiny of legal claims could be foreclosed in all cases involving an individual and the government); *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.23 (1982) (pre-*Schor/Thomas* Article III decision applying a categorical approach but nonetheless noting that elimination of *all* "Art. III judicial review" (including appellate review) would still raise constitutional concerns).

CONCLUSION

For the reasons set forth above and in our opening brief, if the district courts lack habeas jurisdiction over petitioners' claims, the judgment of the court of appeals should be reversed to allow petitioners' claims to be adjudicated in the court of appeals by petitions for review.

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In the Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, et al.,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Whether the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), divests federal courts of jurisdiction to review questions of statutory interpretation presented by a final removal order, either on direct review in the courts of appeals or under the habeas corpus jurisdiction of the district courts.

INTEREST OF THE AMICUS CURIAE

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA" or "Amicus") respectfully submits this brief urging this Court to hold that Immigration and Nationality Act ("INA") section 242, codified at 8 U.S.C. § 1252, does not preclude federal court jurisdiction over Petitioners' claims challenging the statutory basis for a final removal order.[1]

STATEMENT OF INTEREST

The ABA is a voluntary national membership organization of the legal profession. The ABA has over 400,000 members representing every state and territory and the District of Columbia. Its membership and constituency

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[1] This brief is filed with the consent of both petitioner and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, Amicus states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amicus, its members or its counsel has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief or reviewed the brief prior to filing.

include prosecutors, public defenders, attorneys in private practice, legislators, law professors, law enforcement and correction personnel, law students and a number of non-lawyer associates in related fields.

The ABA has a historic interest in questions concerning the jurisdiction of federal courts to hear and decide claims by aliens seeking fair enforcement and implementation of our nation's immigration laws in accordance with the Constitution. Consistent with its objective of securing fair and constitutional implementation of immigration laws, the ABA's policymaking House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee, consisting of representatives of nine ABA entities with relevant expertise (e.g., in administrative law), has assisted in organizing numerous pro bono immigration representation efforts and trained volunteer attorneys from the private bar to counsel immigrants in deportation proceedings and represent them on appeal. The ABA has previously submitted briefs as amicus curiae in several matters before this Court concerning the right of aliens to judicial review of orders affecting their ability to remain in this country. *See, e.g.*, Amicus Brief of ABA in *McNary v. Haitian Refugee Ctr.*, 498 U.S. 477 (1991) (endorsing view subsequently adopted by this Court that district court had jurisdiction to hear broad-based challenge to INS procedures affecting resident alien farmworkers).

The ABA appears as amicus curiae in this proceeding because the question presented herein has serious implications for the administration of justice and, in particular, for the constitutional rights of certain classes of resident aliens to a judicial forum in which their statutory and constitutional challenges to orders of removal may be heard.

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STATEMENT OF THE CASE

In the interest of judicial economy, Amicus respectfully refers the Court to the statement of the case contained in the Petitioners' Brief.

SUMMARY OF ARGUMENT

Amicus confines its discussion to the issue of whether the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), divests the federal courts of jurisdiction to review questions of statutory interpretation presented by a final removal order, either on direct review in the courts of appeals or under the habeas corpus jurisdiction of the district courts. The text of the INA, and the legal and historical backdrop against which it was drafted, demonstrate that it does not.

As a matter of textual construction (and historical fact), IIRIRA cannot be properly read to eliminate traditional habeas inquiry of final removal orders. When Congress enacted IIRIRA — which does not expressly refer to foreclosing habeas inquiry — it was presumptively aware of this Court's two well-established principles of construction regarding restrictions on habeas jurisdiction. First, congressional repeal of habeas jurisdiction must be explicit, and may not be accomplished by implication. Second, there is a fundamental distinction between legislation that curbs judicial "review" of executive actions and legislation that purports to limit the constitutionally protected habeas inquiry into executive detention. The latter is more vigorously protected against impairment by Congress. This habeas inquiry encompasses examination of all statutory or constitutional bases for questioning the lawfulness of a removal decision.

Reading the INA to preclude habeas inquiry into the validity of removal decisions is not only incorrect as a matter

of statutory construction, but also it would offend Article I, section 9, Clause 2 of the Constitution. Habeas relief to persons seeking federal court inquiry into final removal orders has been guaranteed by the Constitution and by this Court's precedents. Accordingly, where, as here, a construction exists that does not require the Court to render an act of Congress unconstitutional, sound rules of judicial restraint require adopting that reasonable construction.

To demonstrate the historical basis for principles requiring habeas inquiry, section I traces an unbroken line of cases dating back to the beginning of federal immigration regulation in which this Court has made clear that the constitutional right to a judicial forum for habeas inquiry is available to aliens challenging orders of deportation. Section II then describes how, although the scope of the right is not fully settled in every respect, "it clearly encompasses" challenges to the Attorney General's construction of a statute resulting in a final order of deportation.

Applying these established background norms and principles of construction, section III demonstrates that the Government's interpretation of IIRIRA cannot stand. Provisions of IIRIRA that refer only to a restriction of "review" without reference to habeas corpus inquiry are properly interpreted either as not impairing habeas jurisdiction under 28 U.S.C. § 2241, or as requiring at least the level of scrutiny that existed under the pre-1952 legal regime. Whether the Court applies the text of 28 U.S.C. § 2241, or at least the level of habeas inquiry mandated by the Constitution under the pre-1952 habeas regime, Petitioners are entitled to a judicial determination of claims challenging the lawfulness of their final removal orders in either the district courts or the courts of appeal.

Finally, although Amicus urges the Court to read the statute appropriately, and thereby to avoid unnecessarily reaching this constitutional question, Amicus notes that the

construction endorsed by the Government would violate the constitutional right to habeas review, and would be beyond the authority of Congress.

ARGUMENT

Petitioners in this action seek a judicial forum in which to challenge the validity of a Board of Immigration Appeals ("BIA") removal order. A companion case, *INS v. St. Cyr,* presents the type of claim Petitioners intend to raise: whether Petitioners are entitled to consideration by the Attorney General for discretionary relief from removal under former INA section 212(c).[2] In Petitioners' case, the Second Circuit determined that, although Petitioners were not entitled to direct review in the Court of Appeals of the BIA's removal orders, they were entitled to examination of those orders on habeas petition in the district court. The court relied upon and applied Judge Calabresi's careful opinion in *Henderson v. INS,* 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas,* 526 U.S. 1004 (1999), which had reached a similar conclusion under the transitional rules of IIRIRA § 309(c)(4).

This case raises important questions of constitutional law, and has significant consequences both for ensuring the integrity of this Court's long-standing jurisprudence in the area of habeas inquiry, and for protecting the rights of hundreds of individuals who each year would otherwise be removed from the United States because of legal errors committed by Executive Branch officials. As James Madison recognized, banishing a long-term permanent resident such as these Petitioners "from a country into which he has been invited . . . where he may have formed the most

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[2] In *St. Cyr,* the Second Circuit affirmed a district court determination that the replacement of INA section 212(c) by cancellation of removal under 8 U.S.C. § 1229b(a) does not apply retrospectively.

tender of connections, where he may have vested his entire property" is among the most se[vere actions that the execu]tive may take against an indivi[dual. See Madison's Report] on the Virginia Resolutions (18[00) (noting that it is "diffi]cult to imagine a doom" greater [than this). The Great Writ] of Habeas Corpus, guaranteed b[y the Constitution, provides] a crucial safeguard against unla[wful exercises of this grave] power. Indeed, over the past d[ecade, judicial inquiry has] spared hundreds of people from [being wrongfully removed] from this country. Executive Offi[ce for Immigration Review,] U.S. Department of Justice, St[atistical Yearbook (1999),] Table 74.

In this brief, Amicus will co[nfine itself to the jurisdic]tional issue raised by the Gove[rnment: whether a judicial] forum remains available for Pet[itioners' claims challenging] an order of removal under t[he INA as permanently] amended by IIRIRA. As Amic[us will argue — and as the] First, Second, Third, and Ninth [Circuits have found — the] federal courts do retain their his[torical authority to resolve] Petitioners' statutory challenges [to the lawfulness of their] final removal orders.

As set forth below, the Court [should affirm the decision] that Congress has not suspend[ed the right of aliens in] habeas corpus proceedings to ch[allenge in federal court the] legality of executive removal ord[ers against statutory claims] such as those brought by Petitio[ners.]

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[3]Reprinted in 4 Debates, Resolutions and Other Proceedings, in Convention, on the Adoption of the Federal Constitution 555 (Jonathan Elliot 2d ed. 1836).

I.

THE CONSTITUTION GUARANTEES TO ALIENS THE RIGHT TO CHALLENGE THE LAWFULNESS OF THEIR DETENTION AND DEPORTATION BY WRIT OF HABEAS CORPUS.

The legal issues raised by Petitioners in this case — namely their challenges to the lawfulness of final orders commanding their arrest and permanent removal from the United States — fall squarely within the scope of the Constitution's guarantee of the writ of habeas corpus, which may not be abrogated by Congress.

A. *The Right To Habeas Corpus Is Derived From The English Common Law And Is Safeguarded By The Constitution*

Since its earliest decisions concerning the writ of habeas corpus, this Court has recognized that the federal writ derives from the common law and that "the great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). The writ historically has served as "the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not . . . ." Joseph Story, Commentaries on the Constitution of the United States § 1333 (1833).

As Blackstone explained, the value of the writ lies in commanding the government to provide a legal accounting *in court* for its decision to deny a person's liberty:

> [T]he glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute neces-

> sity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, Commentaries on the Laws of England *133.

The Founders considered the principle that physical liberty may be restrained only in accordance with law so fundamental to the preservation of ordered liberty that they guaranteed the Great Writ against legislative or other encroachment in Article I, Section 9 of the Constitution, which provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. Congress immediately vested habeas jurisdiction over claims regarding persons deprived of liberty under or by color of federal authority in the First Judiciary Act of 1789, 1 Stat. 73, 81-82. That jurisdiction has remained in place ever since, and is currently codified at 28 U.S.C. § 2241. Although the Suspension Clause permits Congress to replace the habeas corpus procedure with a functionally equivalent avenue of judicial review, this Court has emphasized that that statutory avenue must be adequate and effective, and its scope must be commensurate with constitutional habeas corpus relief. *See Swain v. Pressley*, 430 U.S. 372, 383-84 (1977); *United States v. Hayman*, 342 U.S. 205, 223 (1952); *see also United States ex rel. Tanfara v. Esperdy*, 347 F.2d 149, 152 (2d Cir. 1965) (finding petition for review adequate means of testing legality of detention under deportation order); *cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (statutory restrictions on multiple habeas applications by state prisoners that lie "well within the compass" of the evolution of judicial doctrine on abuse of the writ do not violate Suspension Clause).

B. *The Guarantee of Habeas Corpus Inquiry Applies With Particular Force To Orders Involving Executive Detention*

That the writ is available to persons who have been detained pursuant to decisions or orders of the Executive Branch is beyond question. Indeed, judicial inquiry into the lawfulness of executive detention, which entails inquiry into the lawfulness of removal orders (see infra at I, C), lies at the traditional core of the writ. *See Felker*, 518 U.S. at 663-64; *Swain*, 430 U.S. at 380 n.13; *id.* at 386 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."). In fact, the scope of inquiry when habeas corpus is applied to actions of *executive* officials has always been greater than the scope of inquiry when it is employed as a remedy for prisoners confined after a federal or state *court* criminal conviction.[4] American habeas law inherited from England a fundamental distinction between confinement by order of a "superior" court or court of record, and confinement by order of an "inferior" tribunal or officer, with the requirement that judicial inquiry into the latter must be fuller in scope. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 982-85 (1998) (Hereinafter, "Neuman, *Habeas Corpus*"). Thus, historically, "[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention." *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238 (1970); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, Cir. J.) ("[T]he au-

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[4] This case does not involve the current scope of the Suspension Clause in relation to postconviction relief, and Amicus takes no position on that issue.

thority, whether given by a legislative act, or otherwise, must be strictly pursued. Such agents cannot act on other persons, or other subjects, than those marked out in the power, nor can they proceed in a manner different from that it prescribes.").[5]

C. *Habeas Corpus Review Is Guaranteed To Aliens Challenging Orders Of Deportation*

This Court has always held that habeas corpus is available to review immigration decisions such as those at issue here. Even before the federal government began regulating immigration in 1875, the federal courts had employed the writ of habeas corpus in the analogous contexts of the extradition of foreign criminals and the return of deserting foreign seamen. *See, e.g., In re Kaine,* 55 U.S. (14 How.) 103 (1853) (extradition); *Ex parte D'Olivera,* 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3967) (Story, Cir. J.) (desertion); Neuman, *Habeas Corpus,* at 990-1004. More significantly, shortly after Congress adopted the first federal immigration statutes, this Court rejected the government's claim that exclusion did not restrain an alien of his liberty within the meaning of habeas corpus doctrine. *See United States v. Jung Ah Lung,* 124 U.S. 621, 626 (1888); *see also Chin Yow v. United States,* 208 U.S. 8, 12-13 (1908) (Holmes, J.).[6] Innumerable decisions since *Junk Ah Lung* confirm that the inquiry on habeas corpus into the lawfulness of detention necessarily includes inquiry into the legal-

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[5] Although both inquiries are sometimes phrased in terms of "jurisdiction," in the case of executive tribunals the term "jurisdiction" encompasses the broad range of legal issues determining the tribunal's authority to order the detention of the individual. *See* Neuman, *Habeas Corpus,* at 982-84.

[6] Because aliens have greater constitutional rights in deportation proceedings than in exclusion proceedings, see *Landon v. Plasencia,* 459 U.S. 21 (1982), the application of the same protection to deportation has followed *a fortiori.*

ity of the order of exclusion or deportation on which the detention is based.

This Court has consistently preserved habeas corpus scrutiny of the lawfulness of deportation orders against efforts by Congress to render them final and conclusive. The Court recounted this history in *Heikkila v. Barber,* 345 U.S. 229, 233-35 (1953), and concluded that statutes adopted between 1891 and 1917, which it had interpreted as narrowing the available scope of review, had precluded review "to the fullest extent possible under the Constitution." *Id.* at 234. These limitations remained in force until the Court ruled that the enactment of the Immigration and Nationality Act of 1952 had made the judicial review provisions of the Administrative Procedure Act ("APA") applicable to proceedings arising thereunder. *See Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955). As discussed more fully in Section II below, the inquiry afforded under the pre-1952 statutes preserved judicial authority over issues of both constitutional and statutory law.

This Court's vigilance in not permitting Congress to eliminate habeas review of immigration decisions reflects this Court's understanding of the fundamental limits on congressional power regarding the treatment of aliens. This Court affirmed aliens' entitlement to habeas corpus in *Nishimura Ekiu,* 142 U.S. 641 (1892), in the midst of public agitation against Chinese immigrants in the 1890s, and reaffirmed this principle in *Heikkila* in the midst of public agitation against Communist aliens in the 1950s. The Court has made clear that Congress's power over immigration does not trump all constitutional protections, and especially not guarantees of separation of powers and proper procedure. As the Court explained in *INS v. Chadha,* 462

U.S. 919 (1983), invalidating a legislative veto over discretionary relief from deportation:

> The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo,* "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."

462 U.S. at 940-41 (citations omitted). Congress's broad substantive power over immigration policy is tempered by judicially enforceable procedural guarantees, especially in connection with deportation proceedings, in which this Court has consistently held due process norms applicable, and especially in connection with lawful permanent resident aliens, such as Petitioners. *See Landon,* 459 U.S. at 32-34 (1982) (emphasizing constitutional status of permanent residents and affirming their procedural due process rights in exclusion proceedings); *Johnson v. Eisentrager,* 339 U.S. 763, 770-71 (1950) (emphasizing constitutional rights of aliens within United States, while denying enemy aliens overseas access to habeas corpus). Just as Congress cannot deprive aliens of these other constitutionally mandated procedural rights, Congress cannot deprive aliens of the privilege of the writ of habeas corpus.

II.

THE GUARANTEED SCOPE OF REVIEW OF DEPORTATION ON HABEAS CORPUS ENCOMPASSES BOTH CONSTITUTIONAL AND NONCONSTITUTIONAL CHALLENGES TO THE LAWFULNESS OF THE DEPORTATION ORDER, AND INCLUDES CHALLENGES TO EXECUTIVE INTERPRETATION OF A STATUTE AS RETROACTIVELY ELIMINATING A FORM OF DISCRETIONARY WAIVER OF DEPORTABILITY.

A. *This Court Has Always Preserved Federal Court Jurisdiction To Conduct Habeas Inquiry, Including Review Of Statutory Interpretation, Against Congressional Attempts To Confer Finality On Deportation Orders*

The requirement that habeas corpus must be available for both constitutional and nonconstitutional challenges to the lawfulness of deportation orders flows both from the nature of the writ and from this Court's decisions regarding the finality of immigration orders. Although the Court has not had occasion to set forth every element required by the Constitution for habeas inquiry into executive removals, the Court has made clear that the minimum that the Constitution requires includes the judicial scrutiny exercised under the pre-1952 immigration acts with regard to final orders of deportation. *See Heikkila v. Barber,* 345 U.S. 229, 233-35 (1953).

In the 1890s, congressional dissatisfaction with judicial correction of executive decisions led to the enactment of provisions purporting to confer finality on executive orders of exclusion.[7] This Court, however, in the seminal case of *Nishimura Ekiu v. United States,* 142 U.S. 651 (1892), held that an alien prevented from landing was "doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." *Id.* at 660. The Court upheld the power of Congress to entrust factfinding to executive officers, but it limited the effect of statutory finality to executive findings *of fact. See id.* at 660. In so ruling, the Court did not describe exclusion as *sui generis,* but found this treatment to be consistent with other processes of nonjudicial detention, like extradition. *Id.* (citing *Benson v. McMahon,* 127 U.S. 457 (1888), and *In re Oteiza,* 136 U.S. 330 (1890)).[8] The Court concluded that, so long as the inspector's decision was within the jurisdiction or authority conferred upon him by the statute (the opinion used those terms interchangeably), it could not be impeached or reviewed by the courts. *Id.* at 663-64.

The following year, in *Fong Yue Ting v. United States,* 149 U.S. 698, 713 (1893), the Court explained that Congress could also constitutionally authorize executive adjudication in deportation cases, "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to

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[7] Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1085; Act of Aug. 18, 1894, ch. 301, 28 Stat. 390. The finality provision was understood as applying in deportation cases, see *Yamataya v. Fisher,* 189 U.S. 86, 96, 102 (1903), and expressly extended to deportation cases in the 1917 recodification. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889.

[8] Extradition, it should be noted, is a process applicable both to U.S. citizens and to aliens. *See e.g., Charlton v. Kelly,* 229 U.S. 447, 465-68 (1913).

intervene."[9] Once again, the Court's approval was limited to the propriety of executive factfinding, and it continued to note the parallel between deportation and extradition. *Id.* at 713-14.

Later, once the Court had emphasized the need for observance of procedural due process in immigration cases, *see Yamataya v. Fisher,* 189 U.S. 86 (1903), it modified its doctrine concerning finality of factfinding by insisting that both the fairness of the administrative hearing and the existence of *some* evidentiary basis for the finding must be open to review on habeas. *See, e.g., Chin Yow v. United States,* 208 U.S. 8 (1908); *Tang Tun v. Edsell,* 223 U.S. 673 (1912); *United States ex rel. Vajtauer v. Commissioner of Immigration at Port of New York,* 273 U.S. 103 (1927); Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence",* 25 San Diego L. Rev. 631, 637-41 (1988).[10]

As this Court emphasized in *Heikkila v. Barber,* 345 U.S. 229, 234-35 (1953), these finality provisions had "the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." The Court, contrasting the due process "some evidence" test with the APA test of substantial evidence on the record as a whole, reaffirmed the existence of this constitutionally protected core of habeas inquiry by noting that full APA review

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[9] In view of the Government's arguments in proceedings below, it is worth emphasizing that the Court referred to a constitutional requirement of judicial intervention, not to a power of review limited to constitutional errors.

[10] Since some of these cases used habeas corpus to enforce procedural due process limitations on exclusion procedures, it may be helpful to observe that they predate this Court's later announcement of the *Knauff* doctrine, which limited the effect of procedural due process in proceedings for the exclusion of nonresident aliens. *See United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537 (1950).

was broader in scope than habeas inquiry, especially with regard to findings of fact. *Id.* at 236 & n.11 (citing *Vajtauer,* 273 U.S. 103, and *Bridges v. Wixon,* 326 U.S. 135 (1945)). The Court later concluded that the full "abuse of discretion" analysis developed under the APA was also broader than the core habeas inquiry. *See United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954). The constitutional requirement of an avenue for judicial inquiry into the legal basis for removal, however, including issues of statutory interpretation, has not been questioned.

Heikkila is particularly instructive in clarifying the unique and protected position of traditional habeas by contrasting the term "judicial review" with habeas inquiry. The Court's emphasis on the phrase "judicial review" reflects a recurring distinction in terminology. Courts have repeatedly stated that particular decisions were not subject to review but were subject to the narrower inquiry on habeas. *See, e.g., Terlinden v. Ames,* 184 U.S. 270, 278 (1902) (extradition); *Nishimura,* 142 U.S. at 663 (observing that while exclusion decision subject to habeas inquiry it could not be "impeached or reviewed").

Thus, as the nature of the writ demands, and as the cases under the pre-1952 statutes demonstrate, the enforcement of this irreducible constitutional minimum has involved statutory as well as constitutional challenges to the lawfulness of executive decisions. *See generally Henderson v. INS,* 157 F.3d 106, 114-16 (2d Cir. 1998) (collecting and discussing cases in which the courts reviewed such challenges). This Court regularly employed habeas corpus as a means to keep executive officials within the bounds of their statutory authority in exclusion and deportation matters. The Court corrected errors of law in the construction of exclusion and deportation grounds in such habeas cases as *Gegiow v. Uhl,* 239 U.S. 3 (1915) (rejecting executive's broad interpretation of public charge exclusion provision); *Mahler v. Eby,*

264 U.S. 32 (1924) (rejecting executive's interpretation of findings necessary for deportation after conviction under espionage act); *Kessler v. Strecker,* 307 U.S. 22 (1939) (rejecting executive's interpretation of ideological deportation provision); *Delgadillo v. Carmichael,* 332 U.S. 388 (1947) (rejecting executive's interpretation of "entry"); and *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948) (rejecting executive's interpretation of multiple criminal conviction deportation provision).[11] As Justice Holmes wrote in *Gegiow*:

> The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus.

239 U.S. at 9.

The constitutional scheme and this Court's precedents enforcing the constitutional right of habeas corpus reflect the fact that without judicial control over statutory interpretation, executive officials would have effective power to deport aliens for any reason they chose. The Government's current interpretation of the INA would avoid this result only in part by construing the language of 8 U.S.C. § 1252(a)(2)(C) as making the courts of appeals' determination of whether an alien "is removable" on listed grounds part of their determination of jurisdiction. This interpretation, however, does not go far enough. Rather, interpretation of the statutory text of § 1252 must be informed by the constitutional right to judicial inquiry when the executive

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[11] These are pre-*Heikkila* decisions in which this Court *rejected* executive interpretations; the Court examined and *upheld* executive interpretations in numerous other cases.

violates any statutory prohibition on the deportation of an alien from this country.[12]

In summary, the constitutional minimum scope of habeas review of findings of deportability enforced by this Court has included the assurance of procedural fairness, the determination of both constitutional and nonconstitutional issues of law, and a review of findings of fact under the "some evidence" standard. *See* Neuman, *Habeas Corpus, supra,* at 1016-20. Application of this standard to encompass issues relating to discretionary relief is addressed below in Section II.C.

B. *The Government's Contention That Habeas Inquiry Need Not Extend To Statutory Challenges Rests Upon A Misunderstanding Of This Court's Statements About The Scope Of Factfinding And Conflates Habeas Inquiry Regarding Executive Detention With Habeas Relief From Criminal Convictions*

Notwithstanding the foregoing precedents, the Government has maintained in the courts of appeals that the scope of inquiry required by *Heikkila* includes only constitutional issues, or an even narrower category. That argument has relied on taking assorted quotations from this Court's opinions out of context. Restored to their proper context, these passages do not support the Government's argument.

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[12]Compare 8 U.S.C. § 1253(b)(3) (prohibiting return of refugee to country where life or freedom would be threatened) with *United States ex rel. Mensevich v. Tod,* 264 U.S. 134 (1924) (examining on habeas under the pre-1952 regime the legality of an order to return an alien to a particular country); *Wenglinsky v. Zurbrick,* 282 U.S. 798 (1930) (per curiam) (directing district court to grant the writ where alien ordered deported to wrong country); *Gorcevich v. Zurbrick,* 48 F.2d 1054, 1055 (6th Cir. 1931) ("It is now well settled that, if a deportation warrant is erroneous in the name of the country to which the alien is to be deported, the warrant is unlawful, and detention under it is invalid.").

First, one element of the constitutionally required habeas inquiry is the due process review of *factfinding* under the "some evidence" test. Statements in pre-1952 deportation cases such as *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U.S. 103 (1927), and *United States ex rel. Tisi v. Tod,* 264 U.S. 131 (1924), that executive *factfinding* is reviewable *only* for due process violations do not provide any support for limiting habeas inquiry into errors of statutory interpretation. The opinions in which these statements appeared in fact always measured the deportation orders against the specific terms of the statute. Similarly, Justice Clark's statement in *Heikkila* that "the function of the courts [on habeas] has always been limited to the enforcement of due process requirements," 345 U.S. at 236, was referring to the scope of review of factfinding, which is the subject of the passage in which it appears.[13]

Some lower courts, most notably the Seventh Circuit in *Yang v. INS,* 109 F.3d 1185, 1195-96 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS,* 522 U.S. 1027 (1997), have recently been misled by references to the jurisdictional importance of constitutional issues appearing in older cases that arose on direct appeal to this Court. These discussions of jurisdiction related to the unique procedural posture of the case and the pleading requirements for bringing a case to this Court *on direct appeal* from the district courts. In those cases, the presence of a constitutional issue was essential to this Court having jurisdiction on direct appeal. *See, e.g.,*

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[13] Moreover, Justice Clark's other opinions reflect his understanding that "due process" includes "conformity to statutory grounds." See *Brownell v. Tom We Shun,* 352 U.S. 180, 182 n.1 (1956) (Clark, J.); *see also United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954) (Clark, J.) (speaking of the use of habeas to ensure the "due process required by the regulations"). That broader usage is understandable in light of the traditional function of habeas corpus as a guarantor of the rule of law.

Vajtauer, 273 U.S. at 105 (citing Judicial Code § 238 as authorizing direct appeal); *United States ex rel. Tisi v. Tod,* 264 U.S. at 132 (same); *United States ex rel. Mensevich v. Tod,* 264 U.S. 134, 135-36 (1924) (same). In that period, habeas cases raising only statutory issues would reach this Court on certiorari from the courts of appeals rather than on direct appeal from the district courts. *See, e.g., Gegiow v. Uhl,* 239 U.S. 3 (1915). Thus, in cases such as *Vajtauer,* this Court's discussions concerned the basis for its own appellate jurisdiction, not the basis for the lower court's habeas jurisdiction.[14]

The Government also persuaded some district courts to redefine the scope of the writ by reference to the standards derived from the use of habeas corpus for challenges to criminal convictions. *See, e.g., Mbiya v. INS,* 930 F. Supp. 609, 612 (N.D. Ga. 1996). But the standard applicable to a person who has already had one or more opportunities to present his legal claims to a court cannot be applied to a

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[14] Another sentence that the Government has taken out of context is the passing observation in *Carlson v. Landon,* 342 U.S. 524, 537 (1952), that the Constitution did not guarantee "judicial review" of a deportation order. That statement was qualified in the original by the need for "judicial intervention under the 'paramount law of the Constitution,' " and this Court's supporting footnote cited habeas decisions that scrutinized the statutory bases for deportation orders and examined the factual bases of those orders under the "some evidence" standard. *See id.* at 537 n.27. Indeed, one of those decisions was quite vehement on the subject. See *Mahler v. Eby,* 264 U.S. 32, 43-45 (1924) ("It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise . . . ."). The Court in *Carlson* was denying the need for full APA judicial review and contrasting such direct review with an attack on habeas. In another case decided the same day as *Carlson,* both majority and dissenting opinions listed the right to habeas corpus among the constitutional rights of aliens, citing *Nishimura Ekiu* as authority. See *Harisiades v. Shaughnessy,* 342 U.S. 580, 586 n.9 (1952); *id.* at 599 & n.5 (Douglas, J., dissenting).

person who has *never* had an opportunity to have *any* court rule on his challenge to the lawfulness of *executive* detention. *See, e.g., Henderson,* 157 F.3d at 120; *Bowrin v. INS,* 194 F.3d 483, 490 (4th Cir. 1999); *Shah v. Reno,* 184 F.3d 719, 723-24 (8th Cir. 1999); *see also* Section I.A *supra.*

A similar conflation occurred in the Seventh Circuit's decision in *LaGuerre v. Reno,* 164 F.3d 1035 (7th Cir. 1998), *cert. denied,* 528 U.S. 1153 (2000). Although the *LaGuerre* opinion alluded to the history of habeas corpus, it did not take note of the traditional understanding that executive officials who violate a statute in ordering detention have acted in excess of their "jurisdiction." *See id.* at 1038 (citing *Felker v. Turpin,* 518 U.S. 651, 663 (1996), and Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 465-74 (1963)).[15] The *LaGuerre* opinion also failed to explore the implications of this Court's decisions in *Heikkila v. Barber,* 345 U.S. 229 (1953), and *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

Attempts to conflate the scope of habeas inquiry into removal orders with review of post-conviction cases fundamentally misconceives the nature and purpose of the habeas corpus guarantee, which originated in the system of English law where there was no separate category of constitutional errors. To adopt the approach of these lower courts would threaten "the core conception of habeas corpus as it has been applied over many centuries," *Henderson,* 157 F.3d at 120, and would deprive all residents of the United States, not only aliens, of a central constitutional protection against unauthorized executive detention.

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[15] Because Professor Bator's article was about postconviction relief, it understandably supplied the court with little information about habeas corpus as a remedy for executive detention. *See* Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act,* 113 Harv. L. Rev. 1963, 1981 & n.104 (2000).

C. *Habeas Review Of Deportation Orders Encompasses Not Only Deportability, But Also The Lawfulness Of Denials Of Discretionary Relief.*

The Government has maintained that the level of inquiry preserved by 8 U.S.C. § 1252 does not extend to the BIA's interpretation of the retroactive effect of statutes governing discretionary relief. However, where the immigration laws have given aliens the right to apply for a discretionary waiver of exclusion or deportation, the inquiry on habeas must also extend to whether the officials have observed any applicable limits on their authority to deny the waiver. The statutory ability to seek discretionary waivers is an important legal right. *See Chadha v. INS,* 634 F.2d 408, 425-26 (9th Cir. 1980) (Kennedy, J.), *aff'd,* 462 U.S. 919 (1983) (noting that such waivers serve to avoid the hardship and suffering that strict application of deportation grounds may entail). This Court has characterized rulings on discretionary relief from deportation as "an integral part of the proceedings which have led to the issuance of a final deportation order," *Foti v. INS,* 375 U.S. 217, 223 (1963), and as one of the " 'matters on which the validity of the final order is contingent,' " *INS v. Chadha,* 462 U.S. 919, 938 (1983) (quoting *Chadha v. INS,* 634 F.2d at 412). As such, transgression of constitutional or statutory limitations on the agency's power must be open to inquiry on habeas review of any resulting detention.

The right to habeas inquiry concerning whether a person has a statutory right to apply for discretionary relief does not require that habeas inquiry must be available with regard to every form of discretionary relief. In some instances, discretion is conferred in such a manner that, aside from constitutional requirements, there is no law to apply, and hence no basis for habeas review. *See Mada-Luna v. Fitzpatrick,* 813 F.2d 1006 (9th Cir. 1987) (regarding deferral of action). Nevertheless, discretion ordinarily is not so limitless, and

even though the ultimate grant of relief may be "a matter of grace," it remains true that inquiry is proper at least as to whether the applicants "have been given a *right* to a discretionary determination." *Jay v. Boyd,* 351 U.S. 345, 354 (1956) (emphasis added); *Dessalernos v. Savoretti,* 356 U.S. 269, 269 (1958) (finding petitioner "entitled to have his application for suspension of deportation considered").[16] The federal courts have long enforced statutory bounds on the official's discretion to deny relief, especially when the officials have failed to exercise the discretion delegated to them.

In the case at bar, Petitioners challenge a statutory interpretation by the Government that would foreclose any right of Petitioners to seek discretionary relief. By long-standing pre-IIRIRA administrative and judicial interpretation, Petitioners would have been eligible under INA section 212(c) to apply for waiver of grounds for their removal. *See Francis v. INS,* 532 F.2d 268 (2d Cir. 1976); *Matter of Silva,* 16I. & N. Dec. 26 (BIA 1976); *Matter of S-,* 6I. & N. Dec. 392 (BIA 1954). This form of relief applies only to aliens, such as Petitioners, who are lawful permanent residents and who have resided in the United States at least seven years.[17] In IIRIRA, Congress reformulated section

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[16] Attempts to analogize exercise of this relief to a Presidential pardon are not instructive in cases involving the delegated power to grant discretionay relief from removal, because the power to pardon is an inherent constitutional power of the President not subject to direction by Congress. *See Schick v. Reed,* 419 U.S. 256, 266 (1974); *United States v. Klein,* 80 U.S. (13 Wall.) 128, 147-48 (1871).

[17] The Government has mischaracterized the situation of a deportable permanent resident under the U.S. immigration laws in its argument that deportation of a permanent resident "is necessary in order to bring to an end an ongoing violation of United States law." Petition for Cert., *INS v. St. Cyr* (No. 00-0767) (quoting *Reno v. American-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 491 (1999)). The INA *authorizes,* but does not *require,* the Attorney General to remove permanent

212(c) relief prospectively as cancellation of removal under 8 U.S.C. § 1229b(a). The Attorney General held that this amendment deprived her of authority to grant relief to Petitioners under the previously applicable standards of section 212(c). Petitioners' challenge to that interpretation raises a claim of statutory construction relating to failure to exercise discretion, not an objection to the manner in which discretion is exercised.[18]

Because Petitioners' claims concern a pure question of law regarding their right to seek discretionary relief under section 212(c), their claims are properly and necessarily subject to habeas inquiry. Indeed, in cases under the pre-1952 statutory regime, the lower federal courts routinely applied the constitutionally guaranteed writ of habeas corpus to ensure the lawful exercise of discretion under the Seventh Proviso, the statutory predecessor to section 212(c).[19] *See, e.g., United States ex rel. Devenuto v. Curran,* 299 F. 206 (2d Cir. 1924) (upholding reasonableness of rule adopted for administration of discretion); *Hee Fuk Yuen v. White,* 273 F. 10, 13 (9th Cir.) (same), *cert. denied sub nom., Pang Hing v. White,* 257 U.S. 639 (1921); *United States ex rel. Patti v. Curran,* 22 F.2d 314 (S.D.N.Y. 1926) (overturning failure to exercise discretion unsupported by statute or regulations), *appeal dismissed,* 18 F.2d 953 (2d

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residents on grounds enumerated in 8 U.S.C. § 1227(a), and a deportable permanent resident commits no wrong, whether civil or criminal, by remaining in the United States when no removal proceedings have been commenced, or while a decision is being made on whether deportability should be waived.

[18] The standards of eligibility for INA section 212(c) relief were not regarded as being too discretionary to be reviewable before 1996, and Petitioners' claim of continuing eligibility is clearly a matter on which there is "law to apply."

[19] The court of appeals described the Seventh Proviso, and its evolution into INA section 212(c), in *Francis v. INS,* 532 F.2d 268, 270-71 (2d Cir. 1976).

Cir. 1927); *Gabriel v. Johnson,* 29 F.2d 347 (1st Cir. 1928) (upholding existence of evidence to sustain finding of ineligibility).

Similarly, this Court and lower federal courts employed the writ of habeas corpus under the pre-1952 regime to ensure the lawful exercise of the authority to grant other forms of discretionary relief under the 1917 Act. *See, United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954) (finding adequate allegation of failure to exercise discretion in accordance with regulations on suspension of deportation under the 1917 Act);[20] *United States ex rel. Adel v. Shaughnessy,* 183 F.2d 371, 372 (2d Cir. 1950) (Frank, J.) (courts can review for clear abuse of discretion or a clear failure to exercise discretion); *United States ex rel. Kaloudis v. Shaughnessy,* 180 F.2d 489 (2d Cir. 1950) (L. Hand, C.J.) (denial of suspension of deportation reviewable on habeas if "the ground stated is on its face insufficient").

The decisions under the pre-1952 regime agree that the agency's imposition of eligibility requirements for discretionary relief that are not authorized by law constitutes a failure to exercise discretion, rendering a resulting deportation order unlawful and therefore subject to correction on habeas. *Accardi,* 347 U.S. at 268; *Mastrapasqua v. Shaughnessy,* 180 F.2d 999 (2d Cir. 1950); *United States ex rel. de Sousa v. Day,* 22 F.2d 472 (2d Cir. 1927); *Gonzalez-Martinez v. Landon,* 203 F.2d 196 (9th Cir.), *cert. denied,*

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[20] In *Accardi,* the dissenting opinion denied that irregularities in a proceeding for discretionary relief under the 1917 Act could be examined on habeas corpus. *See* 347 U.S. at 269-71 (Jackson, J., dissenting). Justice Clark's opinion for the majority rejected this argument, noting that "we are not here reviewing and reversing the *manner* in which discretion is exercised . . . [but rather] the Board's alleged *failure to exercise* its own discretion." *See* 347 U.S. at 268 (emphasis in original).

345 U.S. 998 (1953); *United States ex rel. Berman v. Curran,* 13 F.2d 96 (3d Cir. 1926). In such cases the courts have not hesitated to grant a habeas remedy, even though the executive would still have the opportunity to deny relief as a matter of properly exercised discretion.[21]

Thus, the constitutional right to habeas corpus review of deportation decisions also applies when the unlawfulness inheres in the refusal to exercise discretion. The Constitution requires that habeas remain available to review errors of law and unconstitutionally arbitrary denials, even if the operative standard is narrower than the standards generally applicable under the APA.

III.

SECTION 1252 DOES NOT PRECLUDE FEDERAL COURT JURISDICTION TO EXAMINE THE LEGALITY OF THE BIA'S DETERMINATION THAT RELIEF UNDER FORMER INA SECTION 212(c) IS UNAVAILABLE TO PETITIONERS.

As the court below and numerous other circuits have properly found, Congress did not intend to impair the constitutionally guaranteed right to habeas corpus inquiry when it enacted IIRIRA. Congress did not explicitly repeal habeas corpus jurisdiction under 28 U.S.C. § 2241 for removal cases, and its restriction of "review" in section 1252(a)(2)(C) does not refer to habeas inquiry.

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[21] Petitioners also challenge the BIA's action on constitutional grounds. With respect to these constitutional challenges, it is clear that refusing any judicial inquiry into constitutional issues concerning discretionary relief from deportation would abdicate "the primary responsibility of the Judiciary." *Chadha v. INS,* 634 F.2d at 414.

A. *Section 1252 Does Not Explicitly Enact A Partial Repeal Of 28 U.S.C. § 2241.*

In Felker v. Turpin, 518 U.S. 651 (1996), this Court reiterated the rule that repeals by implication of habeas are disfavored. *Id.* at 658-61; *see Ex parte Yerger,* 75 U.S. (8 Wall.) 85, 103 (1869). *Felker* was decided three months before the enactment of IIRIRA on September 30, 1996, and the decision upheld aspects of Congress's April 1996 revisions of the procedure for postconviction habeas corpus. 518 U.S. at 664; *see, e.g., Mahadeo v. Reno,* 226 F.3d 3, 14 (1st Cir.) (finding proximity of *Felker* to enactment of IIRIRA "particularly revealing"), *petition for cert. filed Dec. 11, 2000 (No. 00-962)*; *Flores-Miramontes v. INS,* 212 F.3d 1133, 1136 (9th Cir. 2000) (finding proximity "particularly relevant"). Given the lively interest of Congress in its habeas corpus reforms, the traditional presumption that Congress is aware of this Court's decisions applies with particular force to IIRIRA.

In view of the text and timing of IIRIRA, it would be a disservice to Congress to read expansively subsections of § 1252 that make no specific mention of habeas corpus or of 28 U.S.C. § 2241 as barring access to the writ.

B. *The Reference To "Review" In Section 1252(a)(2)(C) Does Not Encompass Habeas Corpus Inquiry*

In employing the term "review," and omitting the term "habeas corpus," in 8 U.S.C. § 1252(a)(2)(C), Congress acted against the background of this Court's decisions previously discussed at length that protect the right to habeas corpus against inadvertent or casual impairment.

Language in section 1252(a)(2)(C) providing that there shall be no "review" is thus most naturally interpreted as denying the alien the full scope of APA review, and as affording the alien access to only the narrower form of

habeas corpus inquiry preserved under the pre-1952 immigration statutes, as discussed supra in section II. Such an interpretation is bolstered by the traditional distinction between "review" and habeas corpus noted by this Court in *Heikkila v. Barber,* 345 U.S. 229, 236 (1953); *Nishimura Ekiu v. United States,* 142 U.S. 651, 663 (1892), and other cases.

C. *Two Alternative Readings Of Section 1252 Are Consistent With This Court's Jurisprudence*

Section 1252 may properly be read in one of two ways. One reading, consistent with this Court's decisions in *Felker* and *Yerger,* is that habeas corpus jurisdiction remains available in the district court under 28 U.S.C. § 2241. This interpretation would entail merely affirming the jurisdictional rulings of the court of appeals, and holding that the preclusion of direct review is constitutionally permissible because habeas corpus jurisdiction over these Petitioners' claims is available in the district court.

This interpretation flows naturally from the text. Section 1252(b)(9) would preserve habeas corpus jurisdiction over final removal orders that are not subject to direct review under § 1252(a)(1). The title of § 1252(b)(9) is "Consolidation of questions for judicial review." Section 1252(b)(9) is also qualified by the introductory language that appears at the beginning of subsection 1252(b), which reads "With respect to review of an order of removal under subsection (a)(1), the following requirements apply." Thus, if § 1252(b)(9) is a "zipper clause,"[22] then it serves only to consolidate review of orders subject to direct review, not to preclude habeas jurisdiction over orders that are not subject to direct review. The traditional distinction between

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[22]This Court characterized section 1252(b)(9) as a "zipper clause" in *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 483 (1999).

"review" and habeas inquiry would also support an interpretation of the phrase "Judicial review" in § 1252(b)(9) as meaning APA-style review.

Alternatively, the Court may also construe § 1252 as channeling the required habeas inquiry into the court of appeals on direct review, thereby rendering the exercise of district court habeas jurisdiction in such cases unnecessary. As this Court has recognized, the Habeas Corpus Suspension Clause protects the substance rather than the form of the privilege of the writ. *See Swain v. Pressley,* 430 U.S. 372, 383-84 (1977); *United States v. Hayman,* 342 U.S. 205, 223 (1952). The constitutional requirement would be equally satisfied if aliens were required to seek their remedy in the courts of appeals in the first instance. *See Hayman,* 342 U.S. at 223 & n.40 (discussing requirement of exhaustion of alternative judicial remedies); *United States ex rel. Tanfara v. Esperdy,* 347 F.2d 149, 152 (2d Cir. 1965) (upholding replacement of habeas corpus by direct review of deportation orders).

The Government argues, and some lower courts have observed, that channeling the inquiry directly into the courts of appeals would serve the goal of streamlining the removal of aliens. Congress's power over the jurisdiction of the lower federal courts entitles it to designate any of these avenues, or a hybrid system of review, but Congress must permit some effective avenue for judicial resolution of constitutional and statutory challenges to removal orders.

Thus, while Amicus takes no position on which of these reasonable interpretations of § 1252 best reflects the intent of Congress, the Court should choose among these reasonable constructions that do not violate the constitutional right to habeas corpus inquiry in deportation proceedings.

IV.

IF SECTION 1252 WERE READ AS BARRING ACCESS TO THE WRIT OF HABEAS CORPUS WITH RESPECT TO PETITIONERS' CLAIMS, THEN IT WOULD VIOLATE THE CONSTITUTION.

If the Court were to conclude that a provision of § 1252 prohibits inquiry into the lawfulness of a deportation order on habeas corpus, without providing a substantially equivalent and effective mode of review, that provision would be unconstitutional. Such a prohibition would not be a mere regulation of jurisdiction of the federal courts, because it would permit no alternative forum.[23]

As Henry Hart emphasized, Congress's power to define the jurisdiction of the lower federal courts is subject to constitutional limits, and the explicit limit of the Suspension Clause applies to deportation. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1393, 1397 (1953). When a federal court is unavoidably confronted with an invalid preclusion statute, "its duty is

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[23] Contrary to the Government's suggestion in the court of appeals, *this* Court is not available as an alternative forum. See Brief for Respondent, *Calcano-Martinez v. INS*, at 73 n*. The constitutional limits on this Court's original jurisdiction would forbid this Court to serve as the court of initial jurisdiction for habeas inquiry into deportation orders. The grant of a writ of habeas corpus directly to an executive official, in a case that is not within the jurisdiction of any lower court, would be an exercise of original jurisdiction. Such writs could be granted on behalf of "Ambassadors, other public Ministers and Consuls," U.S. Const., Art. III, § 2, cl. 1, but not on behalf of ordinary aliens. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807).

Moreover, the recent immigration statutes cannot reasonably be interpreted as contemplating that state courts would exercise habeas jurisdiction to review federal immigration decisions, even if such review were constitutionally permissible.

simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction." *Id.* at 1387; *see United States v. Mendoza-Lopez,* 481 U.S. 828 (1987); *Thunder Basin Coal Co. v. Reich,* 510 U. S. 200, 219 & n.* (1994) (Scalia, J., concurring in the judgment).

Well-established principles of statutory construction require that, where reasonably possible, this Court interpret Congress's acts to avoid a grave constitutional question. *See Jean v. Nelson,* 472 U.S. 846, 854 (1985) (interpreting immigration statute and regulations to avoid constitutional question); *United States v. Witkovich,* 353 U.S. 194, 201-02 (1957) (same). Here, such a construction is not only possible, but it yields the most natural reading of Congress's intent.

CONCLUSION

The Court's past fidelity to the Great Writ provides the fundamental answer to the jurisdictional question currently before this Court. This Court should affirm federal court jurisdiction over constitutional and statutory challenges to the BIA's orders.

Respectfully submitted,
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